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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-5193

NAOMI RODRIGUEZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Appellants

-against-

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, RALPH and CHRISTIANE GOLDBERG; GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, RALPH and CHRISTIANE GOLDBERG; GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

JUDGMENT APPEALED FROM

Appellants-Intervenors appeal from the final Judgment and Order of the three-judge district court for the Southern District of New York (Pollack, J., dissenting), entered on April 14, 1976. Therein the District Court declared unconstitutional and enjoined the enforcement of New York Social Services Law §§383(2) and 400 and 18 New York Codes Rules and Regulation (NYCRR) 450.14*, to the extent said statutes and Regulation were applied by the defendant agencies to move children from foster homes after they had been placed there by said agencies for "a year or more," without affording to the children notice and a prior hearing at which the child's parents, foster parents, and, where appropriate, a representative of the child may be heard with respect to the propriety of the proposed move. Appellants-Intervenors, parents of children in foster care, submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented which require plenary review.

OPINIONS BELOW

The opinions below are attached in Appendices as follows:

1. The opinion of the majority of the three-judge court (Lumbard C.J.; Carter, J.) dated March 29, 1976 declaring unconstitutional and enjoining the enforcement of the challenged statutes and regulation is annexed as Intervenors' Appendix "2." The several appellants' separate Joint Appendix A reproduces the March 22, 1976 version of this opinion, amended by the Court on March 29, 1976. The earlier opinion is also the one erroneously reported at 411 F. Supp 1144, without the dissent.

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*Since renumbered 450.10 and hereinafter referred to by that number.

Other opinions are attached in appellants' separately printed joint appendices, as follows: The dissenting opinion of Pollack, J. as amended on March 25, 1976 is Appendix B; The Order and Judgment appealed from, dated April 14, 1976 is Appendix C; The Opinion and Order of Carter, J., dated March 22, 1976, on class certification is Appendix E; The Opinion and Order of Carter J., dated December 10, 1974 on assignment of separate counsel for the children is Appendix G.

JURISDICTION

This class action was commenced by plaintiffs in the United States District Court for the Southern District of New York pursuant to/ 2U.S.C. §1983 and 28 U.S.C. §§2201 and 2202 and 28 U.S.C. §§1343(3) and (4), to declare unconstitutional and enjoin the enforcement of New York Social Services Law §383(2) and 400 and 18 NYCRR 450.10. By Order entered August 19, 1974, a three-judge court was convened pursuant to 28 U.S.C. §2281 and 2284. The Judgment and Order of the three-judge district court (Pollack J., dissenting) was entered on April 14, 1976, and stayed for 30 days pending an application for a further stay to this Court. On the basis of such an application, an interim stay was granted by Mr. Justice Marshall, on May 12, 1976 pending referral to and further order of the Court. On May 24, 1976, the judgment and order was stayed by this Court pending the timely docketing of an appeal or appeals. A notice of appeal was filed by Appellants-Intervenors in the District Court for the Southern District on June 10, 1976.* New York State and New York City defendants and the children have also appealed. The jurisdiction of the Supreme Court to review the decision by direct appeal is conferred by Title 28 U.S.C. Section 1253.

*Intervenors' Appendix 3.

STATUTES AND REGULATION INVOLVED

The constitutionality of two state statutes, New York Social Services Law §§383(2) and 400 and of a State Administrative Regulation 18 NYCRR 450.10 was directly challenged by plaintiffs. Not directly challenged by plaintiff, but also involved were the following statutes: The Due Process Clause of the Fourteenth Amendment to the Constitution, New York Social Services Law, §§392, 383(1), 383(3) and 384-a; Domestic Relations Law, §§110 and 111, Family Court Act, §§611 and 614. The text of these statutes is Intervenors' Appendix "1"..

QUESTIONS PRESENTED

I. Did the district Court have power, under Article III, of the Constitution, to determine the rights of children to notice and a prior hearing in this action, when court appointed counsel for the children opposed such relief as harmful to children, and plaintiffsfoster parents, the only party who claimed this relief for children, were disqualified from doing so?

II. In the context of the New York foster care system, does a child voluntarily placed with public child care agencies for temporary care and not for adoption, have a liberty interest under the Fourteenth Amendment which entitles the child not to be separated from the foster home in order to return home to his or her parents with the consent of the public child care officials, except after notice and a prior hearing, merely because the child has lived in the foster home for "a year or more"; and were the procedures mandated on the basis of such a right necessary and appropriate?

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III. Did the class of children who have lived in a foster home for "more than one year", certified by the District Court, satisfy the requirements for class definition, "typicality" and "representation" of Rule 23, 23(a)(3) and 23(a)(4) of the Federal Rules of Civil Procedure, considering the enormous difference between the situations of the class representatives who had spent at least four years in foster care and had no contact with their parents and absent class members who were away from their own homes for much shorter periods of time and had an ongoing relationship with their parents?

IV. Was due process of law under the Fourteenth Amendment denied to Intervenor-Appellants when the District Court refused to let their witness testify at the trial on March 5, 1975 and arbitrarily limited the defenses they could raise?

STATEMENT OF THE CASE

Plaintiffs in this action are individual foster parents, who, for a stipend, pursuant to state license and contract* with a public child care agency, board children in their homes, and an organization of such foster parents. They sued on their own behalf and on behalf of individual foster children, defining the claims of both as arising after a foster child has resided in a foster home for "a year or more". The foster parents claimed that at the expiration of that time period they acquired a "protected interest" under state law and/or a "liberty" interest under the Fourteenth Amendment of the Constitution entitling them to continue to care for such foster children.

On that basis, the foster parents claimed, New York Social Services Law §§383(2) and 400 and 18 NYCRR 450.10 and the actual practices of the public child care agencies were unconstitutional, because they permitted children to be moved out of the foster

*The provisions governing licensing of foster parents in New York are Social Services Law §§375 through 382; 384 through 386 and 18 NYCRR 7.5. Copies of standard contracts signed by plaintiffs Smith and Goldberg were introduced in evidence and provided that public child care agencies had the right to remove foster children from the foster home at any time.

homes to be either returned home to their parents or transferred to another placement without affording foster parents due process.

The foster children were also alleged to posses a "liberty" interest in their relationship to the foster parents which similarly entitled the children to notice and a hearing before they could be removed from a foster home in which they had resided for "a year or more".

The challenged Statutes and Regulation apply differently to foster parents and children. Neither by the terms of New York Social Services Law §§383(2) and 400 and 18 NYCRR 450.10 nor in practice, is there any provision for notice and hearing to foster children. By contrast, the challenged Statutes and Regulation do provide notice and hearing procedures to foster parents, both before and after the removal of foster children.* There is no provision for notice to the child's parents. Thus in the case of the children, foster parents complained of the absence of all procedures; in the case of foster parents the procedures were alleged to be deficient.

Seven children were named as parties to the action. Each had spent more than four years in foster care at the time the action was commenced. Each had been or was in the process of being the subject of a foster care review proceeding pursuant to Social Services Law §392, in which the foster parents were permitted to participate. None of the children were visited by their parents during the preceding year.

The position advanced on behalf of the children in the foster parents' complaint was subsequently reversed by their court-appointed counsel, who filed an Answer** denying and

* The detailed functioning of these Statutes and Regulation, as well as of Special Services for Children, Procedure #5, promulgated by the City of New York, is described in the Jurisdictional Statements of New York State and City Appellants and here incorporated by reference.

**Appellants' Joint Appendix "H", p. 69a.

opposing the claims which the foster parents had made on the children's behalf. Separate counsel for the children had been appointed by Judge Carter, because of the inherent potential for conflict of interest involved in permitting the foster parents' counsel to represent the children and because he found that, based upon the pleadings filed, counsel for the foster parents would not be able to represent the children adequately. Judge Carter specifically approved of the filing of a new pleading on the children's behalf.*

Defendants in the action were New York State, New York City, and Nassau County officials responsible for the provision of foster care services to children and families in the State of New York and the Executive Director of the Catholic Guardian Society, one of approximately 80 voluntary state-authorized foster care agencies who, on the basis of a purchase of services agreement, provide foster care services on behalf of the City of New York;** This Director never appeared in the action.

In the State of New York children may be placed in foster care coercively as a result of a Court order determining that a child is abused, neglected, in need of supervision or delinquent, (New York Family Court Act, Articles 10 and 7) or voluntarily by consent of the child's parent [New York Social Services Law, §384(2)].***

Children are voluntarily placed in foster care by the

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* Appellants' Joint Appendix, "G", pp. 59a, 66a.

** Hereinafter all referred to as public child care agencies, Perez v. Sugarman, 499 F. 2d 761 (2nd Cir. 1974).

***Social Services Law Section 384-a, also dealing with voluntary placements was not enacted until 1975.

parents signing a placement form:* thereby legal custody of the children is deemed transferred to the local public child care official (Commissioner of Social Services) for the duration of placement, New York Social Services Law §383(2). The form does not mention foster parents. The children named as parties in this action were all placed voluntarily.

Five mothers of children voluntarily placed in foster care were permitted to intervene in the action as intervenor-defendants on August 19, 1974; their children had been or were likely to remain in foster care for one year "or more". The circumstances of these mothers and their children were markedly different from that of the Gandy, Serrano and Wallace children. The children were in foster care for substantially shorter periods of time, and their mothers were actively involved both in visiting their children and in efforts to have the children returned to them.

Intervenor-Appellant Naomi Rodriguez, a young blind mother, voluntarily placed her newborn son, Edwin, in foster care on March 29, 1973.** She placed her child in foster care because of marital difficulties; her husband's violence made her fearful for the safety of her child. Far from abandoning her child, Mrs. Rodriguez visited her child whenever permitted to do so by Harlem Dowling Childrens Service -- with whom the Commissioner of Social Services had placed the child; the child was now in a foster home. By July 1973, Mrs. Rodriguez had separated from her husband and asked these agencies to return the child to her; they refused because, they said, Mrs. Rodriguez required mobility training and a larger apartment. Mrs. Rodriguez didn't know that she could seek legal help until a relative suggested it in April 1974. When she moved to intervene in this action her child had already been in foster care for 15 months.

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* New York Social Services Law §384(2), 384-a.

**Intervenors' Appendix "4" reproduces the placement form she signed.

Intervenor-Appellant Lillian Collazo placed her newborn child, James, in foster care 10 months before she joined this action because she had been erroneously turned down for public assistance prior to the child's birth and had no apartment to which she could bring the child.*

Intervenor-Appellant Mary Robins placed her two boys in foster care after she was hospitalized with abdominal pains, 7 months before she joined this action. She believed no one else could help her care for the children while she was in the hospital.

Intervenor-Appellant Dorothy Nelson Shabazz was accused of leaving her five children unattended and of striking the older ones with a belt. She was told that if she placed her children for three months no court action would be taken.**

These mothers contended that the claims of the foster parents sought to impair and diminish their constitutional and state law rights as parents. Parents do not relinquish those rights by voluntarily placing their children in foster care. Boone v. Wyman, 258 F. Supp. 1143 (S.D.N.Y. 1969) aff'd 412 F. 2d 857, cert. denied 396 U.S. 1024; In re Carla L. 357 N.Y.S. 2d 987, at 998, 45 A.D. 2d 375 (1st Dept. 1974).

The parents, the children and the foster parents were certified as class representatives by order of Carter, J. on March 22, 1976.***

The voluntary foster care program in the State of New York aims to provide temporary substitute care for children whose parents are beleaguered by illness, poverty and other misfortune. It is not a method of surrendering children for adoption. When children are placed in foster care, it is expected that they will return to their parents; foster care

* She signed a different placement form, reflecting the passage of Social Services Law §358-a; it is annexed as Intervenors' Appendix "F"; SSL §358-a was enacted in 1973 as a way of qualifying voluntary placements for federal aid pursuant to 42 U.S.C.A. 608-a.

** After she secured counsel, a neglect proceeding was brought against her and was dismissed by the Bronx Family Court.

***Appellants' Joint Appendix "E", p. 50a.

agencies are required to work with parents to facilitate the return. Believing that a child should not remain in temporary foster care indefinitely, the New York legislature has provided for periodic court review for each child in foster care. Originally the first review had to be initiated by the public child care agencies 24 months after the child was placed in care; in 1975 this was advanced to 18 months. At the Social Services Law §392, review the Court determines whether the child should go home, remain in foster care, or whether parental rights should be terminated in another proceeding on the grounds of abandonment (Social Services Law §384(1)(b) or permanent neglect (Family Court Act, §611 et seq.).

Foster parents are parties to the Social Services Law §392 review. Foster parents who have cared for a child for two years acquire the right to intervene in all proceedings for custody of the child by Social Services Law Section 383(3).*

The District Court found that the foster parents had no entitlement under state law to the continued care of particular foster children and declined to reach the question of whether the foster parents had a fundamental "liberty interest" in the continued care of foster children who had been placed with them for "a year or more". However, the District Court determined that foster children in the designated class did have a right cognizable under the Fourteenth Amendment to a prior "hearing at which all concerned parties may present any

*On the basis ofthesestatutes and the decisions in People ex rel Scarpetta v. Spence Chapin Adoption Services, 28 N.Y. 2d 185, 321 N.Y.S. 2d 65 (1971); cert . denied, sub. nom. De Martino v. Scarpetta 404 U.S. 805 and People ex rel Anonymous v. Saratoga COunty Department of Public Welfare 30 A.D. 2d 756 (3rd Dept. 1968), Appellants argued that SSL §400 was never intended to apply when a child was removed to go home but that SSL §392 did.Compare Matter of W. 77 Misc. 2d 374 355 N.Y.S. 2d 245 (Family Court, New York County (1974) Matter of Dionisio R. 366 N.Y.S. 2d 280 (1975), In re Custody of Mack 367 N.Y.S. 2d 644 (1975) Intervenors had urged the Court to abstain.

relevant information to the administrative decision maker charged with determining the future placement of the child." The Court identified "the right to be heard before being condemned to suffer grievous loss" Joint Anti Fascist Committee v. McGrath 341 U.S. 123, 168 (Frankfurter J., concurring) and found on the basis of "our common past" that such a "loss" was entailed for the children in "the trauma of separation from a familiar environment."

In this context, the District Court refused to distinguish between those situations in which a child is being moved back to the home of his or her parents and those in which the move is to another foster home or institution; the Court held that in both situations the mandated hearing would perform a "salutary" information gathering function. Further, the Court held that since the foster children did not have the capacity to exercise their hearing rights independently, a hearing would be required for every child about to be removed from a foster home in which he or she had resided for "a year or more". The Court left undisturbed the aspect of the statutory scheme which provided for a hearing both prior to and subsequent to the child's removal, pursuant to Social Services Law §400 and 18 NYCRR 450.10. Plaintiff foster parents have not appealed.

ARGUMENT*

In the argument that follows Appellants-Intervenors, parents of children,voluntarily placed in foster care,are concerned with securing review and reversal of so much of the Order and Judgment of the district Court as deprives public child care agencies of the power to consent to the return of children to their parents and deprives the parents

*Supporting Arguments of New York State, New York City and Children Appellants are incorporated by reference.

of the right to have the children returned to them with the agencies' consent. However, some of the questions presented necessarily involve the merits of the Order and Judgment as a whole.

POINT I

THE DISTRICT COURT ERRED WHEN IT ADJUDICATED WITH RESPECT TO THE RIGHTS OF CHILDREN SINCE THERE WAS NO CASE OR CONTROVERSY WITH RESPECT TO THOSE RIGHTS AS REQUIRED BY III, §2 OF THE CONSTITUTION AND FOSTER PARENTS WERE DISQUALIFIED FROM ASSERTING THE CHILDREN'S CLAIMS

This action was originally commenced by O.F.F.E.R. and the individual named foster parents both on their own behalf and that of the foster children in their care and contained identical claims for both sets of parties. In response to a claim of conflict of interest between the foster parents and the children, Helen Buttenwieser, Esq. was appointed as independent counsel for the children by District Court Judge Carter on October 25, 1974.

The Answer filed on behalf of the children by Ms. Buttenwieser denied seriatim each and every allegation of unconstitutionality contained in the Second Amended Complaint, whether advanced with respect to foster parents or children, and alleged in Paragraph 8 that the interests of the children "would be vitally and adversely affected" by the granting of the relief prayed for in that complaint.*

Thus, the court appointed counsel for the children argued that while the statutes and regulations challenged by the foster parents were not harmful to the children, the hearing procedures sought by the foster parents would be.**

*Appellants' Joint Appendix "H", p. 70a.

**She did take the position that if hearing sought by the foster parents were mandated that the children should be represented at the hearings.

At the trial counsel for the children presented witnesses in support of her position.*

Despite Ms. Buttenweiser's insistence that the children were adequately protected by existing procedures, the District Court found those procedures constitutionally insufficient. The District Court thus granted the children relief which they had neither requested nor wanted. As Judge Pollack noted in his dissent, "The Court's opinion anticipates a question of constitutional law in advance of the necessity of deciding it."** Ashwander v. Tennessee Valley Authority, 295 U.S. 288 (1936). There was no case or controversy here in the most literal sense. The children, by their Court-appointed representative, did not seek the relief which was granted to them. They claimed that they were not injured by the state Statutes and Regulation challenged by foster parents. There was no controversy between the children and the several defendants. In Flast v. Cohen, 392 U.S. 83 (1968), this Court stated that the "case" and "controversy" requirement contained in Article III of the Constitution "limits the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." 392 U.S. at 95. With respect to the rights and interests of children determined by the District Court, not only was there not "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions" Baker v. Carr, 369 U.S. 186, 204, (1962), cited in O'Shea v. Littleton, 414 U.S. 488 at 494

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* Florence Creech, Director, Louise Wise Childrens, T48-90; Jane Edwards, Director, Spence Chapin Services to Families and Children, T91-123.

**Appellants' Joint Appendix "B", p. 27a.

(1974), there was no adverseness at all. As Judge Pollack noted in his dissent, "The position of the children taken by the Court is espoused only by the foster parents who have no standing to assert the children's interest."*, citing United States v. Rains, 362 U.S. 17, 21-22 (1960); Tileston v. Ullman, 381 U.S. 44, 46 (1943); Eisenstadt v. Baird, 405 U.S. 438, 443-46 (1972); Barrows v. Jackson, 346 U.S. 249 (1953), for expression of the general rule that one person does not have standing to assert the constitutional rights of another. This Court addressed this issue recently in Singleton v. Wulff, _____U.S._____, 44 U.S. Law Week 5213 (July 1, 1976). There the Court discussed the rationale for the general rule and also recognition of exceptions to the rule. The Court's opinion makes clear that exceptions are to be considered only when the third person is not a party to the litigation. Here, the children are parties and have been provided with independent counsel; representation of the children's interest has been held to satisfy the requirements of Rule 23(a)(4) of the Federal Rules of Civil Procedure and has been praised by the Court.** The claims of the children and of the foster parents were severed by the District Court because of potential conflict of interest and because the Court found that, based on the pleadings filed, counsel for the foster parents could not adequately represent the interests of the children.*** Under these circumstances the foster parents cannot have standing to assert the children's rights over the opposition of the children's counsel. The Majority's insistence in its opinion on the disparity between the interests of the children and the foster parents only underscores this fact. The complaint should have been dismissed.

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* Joint Appendix "B", p. 27a.

** Joint Appendix "E", p 47a.

***Joint Appendix "G", pp. 62a, 64a.

POINT II

IN THE CONTEXT OF THE NEW YORK FOSTER CARE SYSTEM, NO COGNIZABLE LIBERTY INTEREST OF A CHILD IS INFRINGED BY THE DECISION OF PUBLIC CHILD CARE OFFICIALS TO RETURN A CHILD VOLUNTARILY PLACED IN FOSTER CARE BACK HOME TO THE CHILD'S PARENTS, MERELY BECAUSE THE CHILD HAS LIVED IN A FOSTER HOME FOR "A YEAR OR MORE,"* AND THE PROCEDURES MANDATED BY THE DISTRICT COURT WERE UNNECESSARY AND INAPPROPRIATE

a. The decision of the District Court represents an extension of the developing rights of children far beyond any precedent set by this Court in a manner inimical to the central attribute of constitutionally protected parental rights clearly recognized by this Court--the custodial right itself. In holding that a child has a liberty interest under the Fourteenth Amendment which protects a child from leaving the "familiar environment" of the foster home and returning home to his parents, the District Court simply stated "it is by now well settled that children are "persons" within the meaning of the Fourteenth Amendment whose rights are entitled to protection against state abridgement**" citing In re Gault, 387 U.S. 1 (1967); Tinker v. Des Moines School District, 393 U.S. 503 (1965); Goss v. Lopez 419 U.S. 565 (1975). Neither these cases nor the District Court's statement that "children are not mere chattels"*** dispose of this case. The cases cited do not establish that the liberty of children under the Fourteenth Amendment is in all cases the same as that of adults. Compare Tinker, supra, especially concurring opinion of Mr. Justice Stewart of 393 U.S. 515, with Ginsberg v. New York 390 U.S. 629, (1968), and In re Gault, supra, with McKeiver v. Pennsylvania, 403 U.S. 528, (1971). Children are "persons" but they are not autonomous persons; as children they lack the capacity for independent choice and independent action necessary for

* Intervenors discussion focuses on the one year point because that is where the District Court drew the line.

** Intervenors Appendix 2, p. 9

***Intervenors Appendix 2 p. 9.

the exercise of many of the activities encompassed within the concept of liberty under the Fourteenth Amendment; they are "persons" but incomplete persons dependent on adults and their rights and interests are not usually independent of the rights of their parents. See dissenting opinion of Mr. Justice Burger in Goss v. Lopez, supra, at 590-591. The issue is not foreclosed. The liberty interest of children identified by the district Court has never been recognized by this Court.

b. Return home is not just a "removal." When agencies agree to return children to their parents, there are parents involved who want their children and typically have maintained their relationship with the children through visits* and other contacts. When a child is returning home from foster care, the experience of "coming home" is inseparable from "removal." Here the special constitutionally protected parent-child relationship is involved, Stanley v. Illinois, 405 U.S. 645 (1972), and the parents "immediate right to the care, custody, management and companionship of....minor children." May v. Anderson, 345 U.S. 528, 533 (1953), comes into play. Thus, it was incorrect for the District Court to define the rights of children solely in terms of "removal"**.

c. A child has no right to refuse to live with his parents. When the public child care agency returns a child home to his parents from a foster home, no liberty interest of a child in the designated class is implicated. Under our constitutional system as well as under state law the parent makes the critical decisions affecting a child's life, Meyer v. Nebraska, U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (25), Cf. New York Public Health Law, §2504, as well as routi

* Fanshel 4/8/75, p. 23-24; Edwards T. 118-119; Creech T. 82-84; Brennan 4/9/75 p. 89

**Although Social Services Law §383(2) and 400 use the term "removal" intervenors do not believe the Courts are bound by this term in its constitutional analysis. Intervenors also claim that §400 never intended to apply to cases where a child was being returned home.

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decisions affecting daily conduct. A child does not have the right to choose where or with whom he will live.* Least of all does a child have a right to choose not to live with his parents. Such a right would be inconsistent with the parent's right to "custody, care and nurture of the child," Prince v. Massachusetts, 321 U.S. 158, (1944). In the State of New York, a child who runs away from home may be adjudged a Person in Need of Supervision pursuant to Article 7 of the New York Family Court Act, ordered to return home, and subjected to supervision and treatment. Family Court Act §§718, 732, Matter of Ellery C. v. Redlich, 32 N.Y. 2d 588, 347 N.Y.S. 2nd 51. In child custody contests a New York court may consider which divorcing parent the child would prefer to live with, but the child has no right to choose between them. Dintruff v. McCreevy, 34 N.Y. 2d 887, 359 N.Y.S. 2d 281, 316 N.E. 2d 716 (1974).

By placing a child in foster care, the parent, temporarily unable to care for her children, provisionally transfers the power to make many critical decisions affecting the child's upbringing to the local social services official, but the parent does not relinquish his or her constitutionally protected parental rights, Boone v. Wyman, supra, Matter of Carla L. supra.** Therefore, it does not follow that as a result of foster care placement with a particular foster parent for one year the child acquires the liberty to refuse to live with his parents when the public child care agency and his parents jointly determine that he or she could return home. The decision of public child care officials to return a child home at the request of his parents (who have never been adjudged abusive or neglectful) after a year in foster care is inherently not arbitrary. Instead, it is a legitimate recog-

*This is not [illegible] to include incarceration by the State as in In re Cau[illegible] supra.

**Social Services Law §384-a, now expressly provides that a voluntary placement is not a "remand or committment" pursuant to Social Services Law §383(1).

nition of the parent's right to care for the child and consistent with the State's interest in preserving the family structure. By its statutory scheme the State has circumscribed the length of time and the circumstances under which parents may keep their children in foster care.* But the child has no constitutional right to refuse to return home. Cf. Child v. Beame, 412 F. Supp. 593, (S.D.N.Y. 1976).

Plaintiff foster parents had claimed, over the objection of the children's counsel, that children acquired such a right under the Fourteenth Amendment because of an attachment between the foster parents and the children which developed after one year. Although, the District Court did not expressly rest its decision as to the child's rights on this basis, it bears repeating that an essential characteristic of the fundamental constitutionally protected rights of parents with relation to their children must be the freedom from the power of others to interfere or compete for those rights because they too love the children or love them more, Spence Chapin Adoption Services v. Polk, 29 N.Y. 2d 196, 324 N.Y.S. 2d 937 , 939 (1971); ** to interfere with parental rights on the basis of such a claim would utterly destroy "the private realm of family life." Griswold v. Connecticut 381 U.S. 479, 495 (1965).

d. The District Court held that the state had the duty to protect a child from a new kind of harm--the "grievous loss" which the child experienced on being separated from the familiar enfironment of the foster home.

The adjustment process that a child may experience when returning home from foster care is not a harm from which the child is protected under the Fourteenth Amendment and the district Court's application of the concept of "grievous loss" was in-

* SSL §392, 384-a, 384(1)(b) F.C.A. 611.

**See discussion of the aftermath of Painter v. Bannister, 258 Iowa 1390, 140 N.W. 2d 152 (1966), cert. denied, 385 U.S. 949 (1967) in Peter L. Strauss & Joanna B. Strauss, Beyond the Best Interest of the Child, 74 Columbia Law Review 996 at 1007.

correct.

Plaintiff foster parents, focusing only on "removal", claimed that when a child returns home from foster care after one year, the child may suffer from disruption of his or her relationship with a foster parent or simply from a break in continuity. The nature of the child's loss in this context was entirely speculative.* Moreover the district Court never considered children's psychological gains in being reunited with their families as a result of the move. In so doing, the Court not only ignored the rights of parents but was insensitive to children's attachments for their own parents and the child's reciprocal right to his own parent's care and companionship.** cf. Levy v. Louisiana 351 U.S. 68 (1968), Stanley v. Illinois, supra. In the words of Professor David Fanshel, the child "may have an instantaneous reaction to the separation from what he has gotten accustomed to" but "he's gaining a lot from the restoration of primary contact"*** with his parents."

The Court's reference to "our common past" as the source of the right for children it was creating did not explain why the loss to a child in the designated class in being dislocated from a familiar environment is greater than its loss in continuing to be separated from his parents and his home. The values of "our common past" are that children belong home with their parents not because they are chattels but because of a powerful sense of identification between parents and children that is reciprocal and includes in addition to its emotional content, the sense of being part of a distinct biological, social and cultural unit that is central to our social structure.

* Fanshel 4/8/75, p. 56-61, 64, 68-69; Grunebaum 4/10/75, p. 30-31, 43, 58-59, 64, 73-74; Kovel 4/2/75, p. 27-28; Katkin, Bullington and Levine, Above and Beyond the Best Interest of the Child: An Inquiry Into the Relationship Between Social Science and Social Action, 8 Law and Society Review 669 (1974).

** Weinstein 2/18/75 p. 59-60.

*** Fanshel 4/7/75, p. 69-70.

The relationship between parent and child recognized by this Court as protected by the Constitution is a relationship of unique intimacy "far more previous than property rights", May v. Anderson, 345 U.S. 528, 533 (1953), directly growing out of the act of procreation, "one of the basic civil rights of man" Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). This right has not depended on whether parent and child were currently living together; May v. Anderson, supra; Armstrong v. Manzo, 380 U.S. 545 (1965); Stanley v. Illinois, supra. While the litigants in those cases were parents, the rationale and analysis of the constitutional protection of family life necessarily reflects the social judgment that "a child's own family is the best place for him to live"*

The district Court erred when it applied the concept of "grievous loss" to the return of children home to their parents after a year in foster care. The term "grievous loss" has been used by this Court to characterize unrelieved deprivation. In Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, it was public stigmatization with consequent inability to retain or obtain public employment; in Goldberg v. Kelly, 397 U.S. 204, 1970) it was "the brutal need" of the destitute welfare recipient; in Morrissey v. Brewer, 408 U.S. 471 (1972), and Wolff v. McDonnell, 418 U.S. 539 (1974), it was return to prison and longer stay in prison.. By contrast, a child's leaving a foster home after one year to return to its own home is very far from the concept of deprivation. There is no grievous loss involved here.

e. Further ,there was no basis for the district Court's determination that certain liberty interests requiring due process

*Brennan 4/9/76, p. 12

protections attach to children in foster care precisely at one year. The majority opinion provides no explanation of the significance of the one year measure but merely accepts the time measure used in defining the class. No witness testified that anything significant in a child's development in foster care occurred at one year as opposed to any other time period. On the contrary, the overwhelming testimony was that one year had no special significance* and one of the foster parents' witness expressly acknowledged the arbitrariness of time measures in analyzing the children's relationship to their own parents as well as to foster parents and compared them to the fixing of criminal sentences and voting age **

As Judge Pollack pointed out in his dissent,***since the New York Legislature did not permit any legal recognition of a child's relationship to foster parents as against the child's own parents until the child had been in foster care for 24 months, and the time measures were not shown to be irrational or unfair, the district Court should have deferred to the judgment of the New York State Legislature instead of legislating by judicial fiat. Ferguson v. Skrupa, 372 U.S. 726 (1963).

f. The decision of the district Court to prefer a child's continuation in foster care over speedy reunion with his or her own family with the approval of public child care/ officials is contrary to the purpose of the foster care program.

Title XX of the Social Security Act, which provides funds to the States for Social Services Programs to individuals and families including foster care services, lists among the national goals of Congress, "preserving, rehabilitating or

*Grunebaum 4/10/75 p. 29-30, Weinstein, 3/19/75 p. 20.

** Goldstein 4/1/75 p. 30, 48-49.

*** Appellants'Joint Appendix "B" p. 32 a.

reuniting families " 42 U.S.C.A. 1397(3). New York State includes in its definition of foster care services "counseling with the parent or other responsible relative to improve home conditions and enable such child to return or remain in his own home or the home of another relative as soon as is feasible;"* See also Ramos v. Montgomery, 313 F. Supp. 1179, (S.D. Cal. 1970), aff'd mem. 400 U.S. 1003 (1971). The enactment of Social Services Law Section 384-a in 1975 affirms the intent of the New York Legislature to facilitate the return of children to their parents. The decision of the district Court will have just the opposite effect; it will keep children in foster care away from their parents for longer periods of time and may cause the destruction of families.

g. The decision below, if implemented, will seriously undermine the viability of the foster care program for the poor parents and children whom it has served in the past.

Parents entrust their children to the care of public child care officials because they believe their children will be safely and well taken care of for them and will be returned to them when they are able to resume child care.** If parents now discover that at the end of a year in a foster home their child cannot be returned to them by the public officials in whom they had placed their trust, and that instead they must participate in a custody contest against unsuspected rivals - the foster parent and their own child - they will quite rightly become reluctant to use foster care placement. Yet the net result may be poorer and more makeshift care for the children.***

The encouragement to litigation provided by the order and judgment of the Court will encourage foster parents to transform

*The Comprehensive Annual Social Services Program Plan for the State of New York for the Year 1975-1976 (Volume I, September 1975. page 48.

** Jenkins 4/11/75, p.3-4

*** Fanshell, 4/8/75p.34-35; Grunebaum 4/10/75,p.41-42

foster care into a system for the transfer of parents, destroying the very families whom it was designed to help. Foster parents who had hitherto recognized their obligation to respect and support foster children's ties to their parents will have a powerful incentive to subvert those ties in order to create a basis for victory in a later custody contest. This can only result in great emotional stress on the children, torn between loyalty to their parents and the need to please the foster parents on whom they depend for day-to-day care.*

h. The district Court's decision is also deeply unfair because it changes the nature of the parents' right to the return of their children retrospectively after thousands of parents have already placed their children, relying on the power of the public child care agencies to return their children to them, so long as they did all they could to visit their children and worked to resume their parental responsibilities.**

Intervenor-appellants and members of their class have never been adjudged to be bad parents.*** Unlike parents whose children have been placed in foster care on the basis of a Court adjudication that they have abused or neglected their children pursuant to Article 10 of the New York Family Court Act, they are primarily parents beset by physical or mental illness, poverty related problems such as eviction, denial of public assistance benefits, who have been concerned enough about their children to place them in foster care to assure that the children received proper care until they were able to resume caring for them. Yet the district Court treats them as if they had in fact been abusive and neglect-

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* Grunebaum, 4/10/75, pp. 41-42.

** Intervenors' Appendix "5"; Affidavits of Naomi Rodriguez and Sara Ruff.

N.Y.C. Dept of Social Services Special Service for Children, Procedure #21, February, 1976 prohibits the acceptance of voluntary placements in cases involving possible child abuse or neglect.

ful when it mandates that a hearing be held without probable cause, just to make sure that the parent hasn't forfeited his or her right to care for the child.

i. The district Court rejected these arguments, saying that they confused the process by which the decision to return children to their parents would be made with the standard for decision which would govern any contest between parent and foster parent for the child's custody.* However, when drawing this distinction, the district Court simply ignored the enormous emotional and financial burden which forced participation in litigation will impose on the parent-child relationship during litigation while the child resides with the parent's adversary. The parent will be deprived of the child's care and companionship in the interim. The delay caused by custody litigation is particularly harmful, because further passage of time itself tends to shift the equities. Moreover, the criteria for decision in custody proceedings, even given "the primacy of parental rights," are sufficiently amorphous to permit the conclusion that the enforced litigation mandated by the district Court will increase the risk that a child will not be returned to the parent who is typically poor, uneducated and belongs to a minority group; typically the parent will be unable to secure the costly expert testimony of psychiatrists or psychologists which is, too often now, crucial in custody contests.

The extraordinary delay which results when the child's return is contested is illustrated by the case of two families involved in this action. Intervenor Naomi Rodriguez asked to have her child returned to her in February 1973. The agency caring for the child refused to do so. In October 1974 she finally

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* Intervenors Appendix 2, page 10, 15.

sued for the return of her child*. Litigation did not conclude until June 1976, when the Family Court decision refusing to return the child was reversed on appeal. In the Matter of Rodriguez v. Dumpson, ____A.D.2d_____, 383 N.Y.S. 2d 883 (1976). Nassau County Childrens Bureau had decided to return two of the Wallace girls who are parties to the action to their mother Patricia Wallace in June-July 1974. When this action was commenced and the agency was restrained from returning the children, the mother in August 1974 commenced a custody proceeding. The litigation was not concluded until April 1976, when the New York Court of Appeals dismissed an appeal from the decision of the Appellate Division affirming the decision to return the two girls to her immediately. State ex rel Wallace v. Lhotan, New York Law Journal, March 1, 1976, p. 2 col. 1. (2d Dept. February 23, 1976); appeal dismissed and leave to appeal denied,____NY____, New York Law Journal, April 9, 1976, page 5, col. 2.

This Court has recognized that the imposition of a litigational burden can itself cause an unconstitutional detriment. Stanley v. Illinois, supra; Armstrong v. Manzo, 380 U.S. 545; Speiser v. Randall, 357 U.S. 513. The imposition of such a burden cannot be constitutionally supported simply in the name of "salutary" information gathering*.

j. On balance, the loss to the parents of children in foster care, if the decision of the district Court is upheld will be far more grievous and irreparable than any difficulty encompassed for children in the process of separating from foster parents and reuniting with their parents after a year in foster care.

*Intervenors' Appendix "2" p.11

k. For this reason, even if one were to accept for the purpose of argument that some liberty interest of a child is infringed when it leaves a foster home after one year to return to its own home, Intervenors believe that the procedures mandated by the district Court were unnecessary and inappropriate.

In Matthews v. Eldridge ___U.S.____, 44 U.S. L.W. 4224 (February 24, 1976) at 4229, this Court articulated the factors to be considered in determining the constitutional sufficiency under the Due Process Clause of administrative procedures. The Court identified "three distinct factors: first, the private interest that will be affected by the public action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

The private interests of children and their parents have already been analyzed; the public interest in "preserving rehabilitating or reuniting families"(42 U.S.C.A. 1397(3) and the need to keep foster care viableas a service to poor parents have also been referred to.

Focusing further on the criteria set forth in Matthews v. Eldridge supra, the prior hearings mandated by the district Court will serve no purpose that is not already accomplished when an agency decides to return a child home; the risk of error through the procedures now used is small indeed.

Although the Court said that a hearing prior to a child's return home would perform a salutary information-gathering function*, in fact it was asking for information already known

*Intervenors' Appendix "2" p. 11

to child care officials prior to authorizing the return home; the court also assigned to this hearing a function which the Legislature has vested in the Family Court. The Court thought that at the hearing the agency would ascertain whether and how often the parent had visited the child, and whether proceedings to terminate parental rights under Section 611 of the Family Court Act should be instituted if the parent had not visited. This astonishing suggestion reflects a complete misunderstanding of the information in the possession of the public child care agencies concerning the children in their care. Visiting between parents and children in foster care is tightly controlled and supervised by the agencies. Visits must be scheduled in advance by the parent and the agency, and generally take place at the agency office. Parents visit foster homes infrequently mainly outside of New York City.* Further, SSL §392 vests in the New York Family Court the power to review agencies' decision whether or not to institute proceeding for termination of parental rights.

Pursuant to New York Social Services Law Section 372, 18 NYCRR §§450.2; 450.2(b)(7)(iii); 450.9, as well as a matter of social work practice, agencies maintain voluminous case records with respect to the children in their care, the children's parents as well as the foster parents. Cf. Matter of Carla L., 45 A.D. 2d 375, 357 N.Y.S. 2d 308; In re Darnell, 77 Misc. 2d 1008, 355 N.Y.S. 2d 308.

The district Court acknowledged that in any hearing involving the return of a child home to his parents the applicable standard

* Affidavits of Naomi Rodriquez, Sara Ruff, Lillian Collazo, T Lhotan 163, T Creech 51, 52, 65; T Edwards, 109, 121, Cf. 18 N.Y.C.R.R. 450.2(b)(7)(iii); 18 N.Y.C.R.R. 450.9, 450.9(b((1) and (b)(2); Approximately 70% of all children are under the care of City agencies.

would be,*

> "Child and parent are entitled to be together, unless compelling reasons stemming from dire circumstances or gross misconduct forbid it in the paramount interest of the child, or there is abandonment or surrender by the parent," Spence Chapin Adoption Services v. Polk, 29 N.Y. 2d at_____, 324 N.Y.S. 2d 937 at 939 (1971)

Application of this standard does not protect the child from separation from its familiar environment; instead, it determines whether the parent is able to care for the child and will not harm it. But the foster parent knows the parent little, if at all, while the agency has investigated parent extensively.

Only extraordinary new information would make a difference under this standard. However, the child care agency normally already possesses such information or, if apprised of it, informally, would delay the child's return home. The public child care officials involved in the ultimate decision to return a child home from foster care are the officials charged with the protection of children in the State and/ the prevention of child abuse and neglect. Since these officials do not want to take undue risks, they tend to err in the direction of retaining children in care rather than returning children to their parents indiscriminately. This fact explains the great pains they take in making the decision to return a child** and is reflected in the relatively low discharge rates reported by Professor Fanshel on the basis of his longitudinal study and cited by the Court***. It is also reflected in Professor Fanshel's finding that 90.1% of the children in his study who were returned home to their parents did not re-enter foster care.**** The decision to

*Intervenors' Appendix "2" page 10.

** T Edwards 106-107, see also 18 N.Y.C.R.R. 450.2(e)

***Intervenors Appendix "2", footnote 5. Also see defendant Shapiro and Lavine's Answer to Interrogatories #3.

**** Table G. Intervenors Exhibit "A", Fan[illegible] 4/12/75..

return a child hom is thus extraordinarily reliable and the hearings ordered by the district Court are superfluous.

The district Court's holding that a hearing must be held not on request of the child or its representative, but instead must be held automatically in every case, only emphasizes the heavy-handedness of that Court's mandate. There is no precedent for this order in decisions of this Court. Here the paradox of creating rights for children who cannot exercise them emerges. Even if hearings must be held, surely a scheme involving so much enforced and unnecessary litigation is improvident.*

POINT III

THE CLASS OF CHILDREN CERTIFIED BY THE DISTRICT COURT WAS TOO BROAD AND DID NOT MEET THE REQUIREMENTS OF RULE 23, 23(a)(3) AND 23(a)(4) OF THE FEDERAL RULES OF CIVIL PROCEDURE

The Order and Judgment of the District Court awarded relief to a class of children who had had "continuously lived in a foster home for more than one year". In the Majority Opinion it was explained that relief was being given to this class because that was the class that was certified. The order certifying the class accepted the measure of "more than one year" or "a year or more" without any explanation.

By use of this ambiguous class definition which includes children who have been in foster care for one year, as well as children who have been in foster care ten years, the scope of this action was enormously expanded without any proper legal basis.

None of the foster children named as parties in the action required the "one year" measure; they all had been away from home and resided with particular foster parents for "more". All the

*One solution not considered by the Court was to provide children with law guardians for the duration of the S.S.L. §392 review; such guardians could be appointed pursuant to F.C.A. §249.

Puzzling and objectionable is the Court's concern for procedural due process for foster parents (Intervenors' Appendix "2", p. 11) preceded by a holding that they had no constitutionally protected rights.

children had been in foster care for at least four years; two of the children had resided with plaintiff foster parents for twenty-one months; the other five had resided with plaintiff foster parents for at least four years. There were thus no live plaintiff children whose interest required the "a year or more" class definition. There was no analysis anywhere explaining why the length of time in a foster home was to be the defining measure, rather than the length of time in foster care. Compare the care with which a time measure was justified in Sagers v.Yellow Freight System, Inc., 529 F. 2d 721, 5th Cir. (1976).

Similarly, the District Court took no account of the fact that the children named as class representatives had not seen their parents for a year, while there are children in foster care for "a year or more", such as Intervenors' children, who are frequently visited by their parents.

Although the challenged Statutes and Regulation applied to all the children in the class as designated, the action must be regarded first as a claim for the recognition of previously unrecognized substantive rights for children under the Fourteenth Amendment. With respect to this claim, the children in the designated class arguably have divergent, conflicting, or unascertainable interests. Because of the sensitivity and complexity of the issues, the vague and subjective nature of the interest asserted on behalf of the children, and the difficulty of representing persons who cannot fully articulate their interests, a stricter standard should govern the question of class certification under Rule 23 than is thought appropriate in employment discrimination cases, for example. Cf. Oatis v. Crown Zellerbach Corp., 5th Cir. (1968), 399 F. 2d 496, 699.

The factual, social and legal dimension of the claims of the children named as class representatives were significantly different from any claims that could be made on behalf of

children who had been away for their own homes for one year, or eighteen months, or even two years and were in frequent contact with their parents. The record is replete with testimony highlighting the extreme significance of visiting in relation to time. This is a major factor bearing on the interests asserted in this action.* The difference in the views of the foster parents and counsel for the children with respect to the interests of the children strongly supports this view.

The class of children as defined does not satisfy the requirements of Rule 23, 23(a)(3) and (a)(4) of the Federal Rules of Civil Procedure with respect to class definition, typicality and representation.

The claims of the children named as class representatives were not co-extensive with the claims of the alleged class members Koehler v. Ogilvie, 53 F.R.D. 98 (N.D. Tell 1971) aff'd mem. 405 U.S. 906 and the class certified by the District Court was over-inclusive.

Courts have failed to give Rule 23(a)(3) a commonly accepted meaning, Taylor v. Safeway Stores, Inc., 524 F 2d 263 (10th Cir. 1975); see Note, Class Actions: Defining the Typical and Representative Plaintiff under Subsections (a)(3) and (a)(4) of Federal Rule 23 (53 Boston U.L Review 406, 1973), and the issue has not been determined by this Court.

There must be a comparison of the claims of the representatives with those of the proposed class. Where the underlying facts or interests of the class representatives and those of absent members differ greatly, as in the instant case, the claim of the representatives cannot be typical of the proposed class. Cf. Phillips v. Klassen, 502 F 2d 362 (D. C. Cir. 1974) cert. denied 419 U.S. 996 (1974).

*Cruncbaum 4/10/75, p. 28; Solnit 5/13/75, p. 120; Chess 4/7/75, pp. 74-75; Edwards T118-119, Fanshel 4/8/75, pp.23-24.

When the District Court considered whether the class it certified was adequately represented, all it did was evaluate the children's counsel. But adequacy also rests on the factor that the class representatives must not have interests antagonistic to those of the absent class members. Wetzel v. Liberty Mutual Ins. Co., 508 F 2d 239, 247 (1975); Albertson's Inc. v. Amalgamated Sugar Co., 503 F 2d 459 (10th Cir. 1974). Here there was antagonism between the interests of children who had on-going relationships with their parents, through visiting, and had been in foster care for substantially shorter periods of time, and the class representatives. The class representatives may have been injured by the challenged Statutes and Regulation, while absent members were not. The required "nexus" between the interests of the class representatives and the absent class members does not exist in the class as certified by the District Court. See Barrett v. W.T. Grant Co., 578 F. 2d 543 (4th Cir. 1975). The District Court had the discretion to determine the contours of the class, narrowing it to remove possible antagonism and avoid any injustice to absent class members. See Wetzel v. Liberty Mutual Ins. Co., supra.

By certifying the class of children on the basis of the time measure of "a year or more", the District Court abused its discretion in order to override the intention of the New York Legislature not to afford recognition to any relationship between children and foster parents at that early point.

POINT IV

INTERVENOR DEFENDANTS WERE DENIED DUE PROCESS UNDER THE FOURTEENTH AMENDMENT WHEN THE DISTRICT COURT REFUSED TO PERMIT WITNESSES TO TESTIFY AT THE TRIAL AND ARBITRARILY LIMITED THEIR DEFENSES.

Though Intervenors are considered parties for all purposes, In re Oceana International, Inc., 49 F.R.D. 329 (S.D.N.Y. 1969), Intervenor-Appellants were denied the right to present witnesses

at the trial. They were also arbitrarily denied the right to present all their defenses when the Court excluded their Fourteenth Affirmative Defense: that parents had relied upon their placement forms which referred only to public officials and not to foster parents. (Joint Appellants' Appendix "E", p. 49a)

The District Court limited the trial to one day; prior to trial the parties had agreed to submit depositions of public officials and expert witnesses in lieu of testimony, but parents, foster parents and children were to testify in Court. The foster parents presented four witnesses and counsel for the children, two. When Intervenors' turn came, it was 4 p.m. One witness took the stand, but her testimony was interrupted after only a few minutes and she wasn't allowed to proceed; neither were three other witnesses whom counsel for Intervenors wanted to call.

Thus in an action to secure due process, elementary due process was denied. Lindsey v. Normet, 405 U.S. 56, 66 (1972); Goldberg v. Kelly, 397 U.S. 254, 267-268 (1970); Reynolds v. Cochran, 365 U.S. 525, 530-531 (1961).

CONCLUSION

The questions presented by this appeal are substantial and of public importance. Their resolution vitally affects thousands of parents and their children in foster care in the State of New York and in the nation. This Court should note Probable Jurisdiction.

Dated: August 9, 1976
New York, New York

Respectfully submitted,

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THE CHALLENGED STATUTES AND REGULATIONS

New York Social Services Law §383(2):
The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded.

New York Social Services Law §400:
Removal of Children.

1. When any child shall have been placed in an institution or in a family home by a commissioner of public welfare or a city public welfare officer, the commissioner or city public welfare officer may remove such child from such institution or family home and make such disposition of such child as is provided by law.

2. Any person aggrieved by such decision of the commissioner of public welfare or city welfare officer may appeal to the department, which upon receipt of the appeal shall review the case, shall give the person making the appeal an opportunity for a fair hearing thereon and within thirty days render its decision. The department may also, on its own motions [sic], review any such decision made by the public welfare official. The department may make such additional investigation as it may deem necessary. All decisions of the department shall be binding upon the public welfare district involved and shall be complied with by the public welfare officials thereof.

18 N.Y.C.R.R. §450.14* Removal from foster family care.

(a) Whenever a social services official or another authorized agency acting on his behalf proposes to remove a child in foster family care from the foster family home, he or such other authorized agency, as may be appropriate, shall notify the foster family parents, in writing of the intention to remove such child at least 10 days prior to the proposed effective date of such removal, except where the health or safety of the child requires that he be removed immediately from the foster family home. Such notification shall further advise the foster family parents that they may request a conference with the social services official or a designated employee of his social services department at which time they may appear, with

* This regulation was renumbered 450.10 as of September 18, 1974.

or without a representative to have the proposed action reviewed, be advised of the reasons therefor and be afforded an opportunity to submit reasons why the child should not be removed. Each social services official shall instruct and require any authorized agency acting on his behalf to furnish notice in accordance with the provisions of this section. Foster parents who do not object to the removal of the child from their home may waive in writing their right to the 10 day notice, provided, however, that such waiver shall not be executed prior to the social services official's determination to remove the child from the foster home and notifying the foster parents thereof.

(b) Upon the receipt of a request for such conference, the social services official shall set a time and place for such conference to be held within 10 days of receipt of such request and shall send written notice of such conference to the foster family parents and their representative, if any, and to the authorized agency, if any, at least five days prior to the date of such conference.

(c) The social services official shall render and issue his decision as expeditiously as possible but not later than five days after the conference and shall send a written notice of his decision to the foster family parents and their representative, if any, and to the authorized agency, if any. Such decision shall advise the foster family parents of their right to appeal to the department and request a fair hearing in accordance with section 400 of the Social Services Law.

(d) In the event there is a request for a conference, the child shall not be removed from the foster family home until at least three days after the notice of decision is sent, or prior to the proposed effective date of removal, whichever occurs later.

(e) In any agreement for foster care between a social services official or another authorized agency acting on his behalf and foster parents, there shall be contained therein a statement of a foster parent's rights provided under this section.

OTHER STATUTES INVOLVED

United States Constitution, Amendment XIV. "...nor shall any State deprive any person of life, liberty, or property, without due process of law..."

New York Social Services Law §383. Care and Custody of children

1. The parent of a child remanded or committed to an authorized agency shall not be entitled to the custody thereof, except upon consent of the court, public board, commission, or official responsible for the commitment of such child, or in pursuance of an order of a court or judicial officer of competent jurisdiction, determining that the interest of such child will be promoted thereby and that such parents is fit, competent and able to duly maintain, support and educate such child. The name of such child shall not be changed while in the custody of an authorized agency.

3. Any adult husband and his adult wife and any adult unmarried person, who, as foster parent or parents, have cared for a child continuously for a period of two years or more, may apply to such authorized agency for the placement of said child with them for the purpose of adoption, and if said child is eligible for adoption, the agency shall give preference and first consideration to their application over all other applications for adoption placements. However, final determination of the propriety of said adoption of such foster child shall be within the sole discretion of the court, as otherwise provided herein.

Foster parents having had continuous care of a child, for more than twenty-four months, through an authorized agency, shall be permitted as a matter of right, as an interested party to intervene in any proceeding involving the custody of the child. Such intervention may be made anonymously or in the true name of said foster parents.

New York Social Services Law §384-a. Transfer of care and custody of children

1. Method. The care and custody of a child may be transferred by a parent or guardian to an authorized agency by a written instrument in accordance with the provisions of this section.

2. Terms. The instrument shall be upon such terms, for such time and subject to such conditions as may be agreed upon by the parties thereto. The department may promulgate suggested terms and conditions for inclusion in such instruments, but shall not require that any particular

terms and conditions be included. If the instrument provides that the child is to be returned by the authorized agency on a date certain or upon the occurrence of an identifiable event, such agency shall return such child at such time unless such action would be contrary to court order entered at any time prior to such date or event pursuant to section three hundred eighty-four or section three hundred ninety-two of this chapter or article six or article ten of the family court act. The parent or guardian may, upon written notice to such agency, request return of the child at any time prior to the identified date or event, whereupon such agency may, without court order, return the child or, within ten days after such request, may notify the parent or guardian that such request is denied. If such agency denies or fails to act upon such request, the parent or guardian may seek return of the care and custody of the child by petition in family court for return of such child and order to show cause, or by writ of habeas corpus in the supreme court. If the instrument fails to specify a date or identifiable event upon which such agency shall return such child, such agency shall return the child within ten days after having received notice that the parent or guardian wishes the child returned, unless such action would be contrary to court order entered at any time prior to the expiration of such ten day period pursuant to section three hundred eighty-four or section three hundred ninety-two of this chapter or article six or article ten of the family court act. Expenditures by a social services district for the care and maintenance of a child who has been continued in the care of an authorized agency in violation of the provisions of this subdivision shall not be subject to state reimbursement.

3. Execution. The instrument shall be executed in the presence of one or more witnesses and shall include only the provisions, terms and conditions agreed upon by the parties thereto.

4. An instrument executed pursuant to the provisions of this section shall not constitute a remand or commitment pursuant to this chapter.

New York Social Services Law §392. Foster care status; periodic family court review

1. As used in this section, unless otherwise expressly stated or unless the context requires a different interpretation, (a) "foster care" shall mean care provided a child in a foster family free or boarding home, group home, agency boarding home, child care institution, or any combination thereof; (b) "child" shall mean a child under the age of eighteen years whose guardianship and custody have been committed to an authorized agency pursuant to section three hundred eighty-four of this chapter by an order of a surrogate or judge of the family court or by a surrender instrument, or whose care and custody have been transferred to an authorized agency by an instrument executed pursuant to section three hundred eighty-four-a of this chapter, or whose custody has been temporarily or permanently awarded to an authorized agency by a judge of the family court pursuant to a finding that the child is a permanently neglected child as defined in section six hundred eleven of the family court act.

2. Where a child has remained in foster care for a continuous period of eighteen months* a petition to review the foster care status of such child:
(a) shall be filed in the family court by the authorized agency charged with the care, custody or guardianship of such child;
(b) may be filed by another authorized agency having the supervision of such foster care;
(c) may be filed by the foster parent or parents in whose home the child resides or has resided during such period of eighteen months.

In the event that a child in foster care is returned to his parent or parents and, within three months of such return, is again placed under the care of an authorized agency, such period of return shall not constitute an interruption of continuous foster care for the purposes of review pursuant to this section. However, the period of return shall not be considered to be a part of any continuous period of foster care for the purposes of determining the length of time that a child may have been in foster care.

3. Such petition:
(a) shall be filed in the family court in the county in which the authorized agency charged with the care, custody or guardianship of such child has its principal office or where the child resides;
(b) shall set forth the disposition sought and the grounds therefor;

* The 18 months time period was introduced by amendment in 1975 (Chapter 708), laws of 1975

(c) shall, when filed by an authorized agency and notice is to be given to a parent, guardian or relative of the child, omit, for good cause shown, the name and address of the foster parent or parents with whom such child is residing at the time of the filing of the petition, and, in lieu thereof, there shall be filed with such petition a verified schedule executed by such agency setting forth the name and address of such foster parent or parents.

4. Notice of the hearing, including a statement of the dispositional alternatives of the court, shall be given and a copy of the petition shall be served upon the following, each of whom shall be a party entitled to participate in the proceeding:
(a) the authorized agency charged with the care, custody or guardianship of such child, if such authorized agency is not the petitioner;
(b) the authorized agency having supervision of such foster care, if such authorized agency is not the petitioner;
(c) the foster parent or parents in whose home the child resided or resides at or after the expiration of a continuous period of eighteen months in foster care;
(d) the parent or guardian who transferred the care and custody of such child temporarily to an authorized agency;
(e) such other persons as the court may, in its discretion, direct.

5. Service of notice of the hearing and the petition shall be made in such manner and on such notice as the court may, in its discretion, prescribe.

6. The court may, in its discretion, dispense with the attendance of the child at the hearing or may, with the consent of the parties, dispense with the hearing and make a determination based upon papers and affidavits submitted to the court.

7. At the conclusion of such hearing, the court shall, upon the proof adduced, in accordance with the best interest of the child, enter an order of disposition:
(a) directing that foster care of the child be continued; or
(b) in the case of a child who has been committed temporarily to the care of an authorized agency by a parent, guardian or relative, directing that the child be returned to such parent, guardian or relative; or

(c) in the case of a child who has been committed temporarily to the care of an authorized agency by a parent, guardian or relative, directing that the agency institute a proceeding to legally free such child for adoption, and upon a failure by such agency to institute such a proceeding within thirty days after entry of such order, permitting the foster parent or parents in whose home the child resides to institute such a proceeding; or
(d) in the case of a child whose guardianship and custody have been committed to an authorized agency by an order of a surrogate or judge of the family court or by a surrender instrument or who has been judicially declared to be a permanently neglected child, directing that such child be placed for adoption in the foster family home where he resides or has resided or with any other person or persons.

An order of disposition entered pursuant to this subdivision shall include the court's findings supporting its determination that such order is in accordance with the best interest of the child. If the court promulgates separate findings of fact or conclusions of law, or any opinion in lieu thereof, the order of dispositions may incorporate such findings and conclusions, or opinions, by reference.

8. The court may make an order of protection in assistance or as a condition of any other order made under this section. The order of protection may set forth reasonable conditions of behavior to be observed for a specified time by a person or agency who is before the court and may require any such person or agency to make periodic reports to the court containing such information as the court in its discretion may prescribe.

9. The court may make an order directing an authorized agency to undertake diligent efforts to encourage and strengthen the parental relationship when it finds such efforts will not be detrimental to the moral and temporal welfare of the child. Such order may include a specific plan of action for the authorized agency including, without limitation, requirements that such agency assist the parent in obtaining adequate housing, employment, counselling, medical care or psychiatric treatment.

10. The court shall possess continuing jurisdiction in proceedings under this section and, in the case of children who are continued in foster care, shall rehear the matter whenever it deems necessary or desirable, or upon petition by any party entitled to notice in proceedings under this section, but at least every twenty-four months.

New York Family Court Act §611
Permanently neglected child

A "permanently neglected child" is a person under eighteen years of age who is in the care of an authorized agency, either in an institution or in a foster home, and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the moral and temporal welfare of the child. In the event that the parent defaults after due notice of a proceeding to determine such neglect, such physical and financial ability of such parent may be presumed by the court. For the purposes of this section, evidence of insubstantial and infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child.

§614. Originating proceeding permanently to terminate custody.

1. A proceeding permanently to terminate the parent's or other custodian's custody of a child on the ground of permanent neglect is originated by a petition, alleging:
(a) the child is a person under eighteen years of age;
(b) the child is in the care of an authorized agnecy, either in an institution or in a foster home;
(c) the authorized agency has made diligent efforts to encourage and strengthen the parental relationship and specifying the efforts made or that such efforts would be detrimental to the moral and temporal welfare of the child and specifying the reasons therefor;
(d) the parent or custodian, notwithstanding the agency's efforts, has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so; and
(e) the best interests of the child require that the parents' or other custodian's custody of the child be terminated permanently.

AMENDED OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO; and GEORGE and DORTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

-v-

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN, ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Defendants.

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Intervenors-Defendants.

COPY

U.S.District Court
Filed
March 29, 1976
S.D. of N.Y.

44102

OPINION

74 Civ. 2010

Before LUMBARD, Circuit Judge, and POLLACK and CARTER, District Judges.

APPEARANCES:

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BEST COPY AVAILABLE

LUMBARD, Circuit Judge:

The Organization of Foster Families for Equality and Reform (OFFER) and three individual foster families bring this class action for injunctive and declaratory relief seeking the invalidation of New York Social Services Law §§ 383(2) and 400, and N.Y.C.R.R. § 450.14. Plaintiffs allege in their complaint that the above provisions violate both the Equal Protection and Due Process Clauses of the Fourteenth Amendment in that they authorize the state to remove foster children from their foster homes without affording a prior hearing to either foster child or foster parents. 1/

Plaintiff foster parents initially sought to represent, as "next friend," the interests of their foster children as well. However, to forestall any possible conflict of interest, Judge Carter appointed Helen Buttenwieser as independent counsel for the foster children, advising the parties of his action by letter dated October 29, 1974. In that capacity, she has consistently argued that the foster parents have no constitutionally cognizable interest independent of those of the foster children and that an adversary hearing is not the proper forum to determine the "best interest of the child." 2/ The defendants--government officials at the state and local level and the Executive Director of the Catholic Guardian Society--are responsible for administering the foster care system within their respective jurisdictions. In addition, five biological mothers of children currently in foster care were granted leave to intervene in these proceedings on behalf of themselves and all others similarly situated. 2a/

The present statutory scheme applicable throughout most of the state,[3] provides that the local public welfare department or an authorized private agency acting on its behalf[4] may, in its discretion and on 10 days notice, order the removal of any foster child from the foster home in which he or she has been placed. Social Services Law §§ 333(2) and 400. After having been informed of the impending removal in a printed notice which contains no space for any detailed elucidation of the reasons for that removal, the foster parents may request a conference with a "public official" of the local social services department at which they have an opportunity to express their dissatisfaction with the agency's decision but no formal manner is provided whereby they may contest it. N.Y.C.R.R.§ 450.14.

Although the foster parents may be accompanied to the conference by "a representative," they may not present or cross-examine witnesses, nor may they inspect the agency files even if records contained therein formed the predicate for the administrative decision. Yet, despite these handicaps, the burden is upon the foster parents to submit "reasons why the child should not be removed." The agency, by contrast, has no countervailing obligation to provide an articulated rationale for removing the child. N.Y.C.R.R. § 450.14. There is evidence in the record which indicates that rarely, if ever, do these pre-removal conferences result in the reversal of the initial decision. Post-removal, the foster parents are entitled to a "fair hearing," Social Services Law § 400(2), and the, if still "aggrieved" the agency action, they may obtain judicial review.

Plaintiffs contend that these procedures deprive them of "liberty and property" interests without due process of law. The specific liberty interest which they assert is

the right to familial privacy. E.g. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Griswold v. Connecticut, 381 U.S. 479 (1965). Cognizant that each of the Supreme Court decisions in this area dealt with a more traditional, biological family, plaintiffs rely on several recent studies which functionally define the family as a psychological rather than a biological unit. Goldstein, Freud and Solnit, BEYOND THE BEST INTERESTS OF THE CHILD. Plaintiffs insist that after one year of foster care, emotional attachments have formed which the state should not be at liberty arbitrarily to upset. Plaintiffs further assert that the statistical evidence as to the length of the average child's stay in foster care creates an "informal tenure" system raising legitimate expectations that their role as foster parents will not be abruptly terminated.[5] Perry v. Sinderman, 408 U.S. 593 (1972). To illustrate the arbitrary manner in which they claim the outlined statutory provisions can operate, plaintiffs offer the example of their own personal involvement with the foster care system.

Madeline Smith is a 53 year old widow who lives in East Elmhurst, New York. She became an approved foster parent[6] under the supervision of the Catholic Guardian Society of New York in 1969. On February 1, 1970, she took Eric and Danielle Gandy into her home as foster children. At the time, Eric was four and Danielle, two. Plaintiffs claim, and defendants do not dispute, that Danielle has never seen her natural mother and Eric no longer remembers her. Both children, who are legally free for adoption consider Mrs. Smith to be their mother.

Nevertheless, on March 29, 1974, Mrs. Smith was notified by letter from the Catholic Guardian Society that Eric and Danielle were to be removed from her care because

"it is now in their best interests to leave your home." The agency's concern, not shared by Mrs. Smith, was that her arthritis would interfere with her undeniably well-meaning efforts to supervise the increasingly active behavior of Eric and Danielle. Although Mrs. Smith signed a waiver of her right to a pre-removal conference, she made it abundantly plain that she had no intention of surrendering the children. When told that they would be forcibly taken from her, she obtained a lawyer and began the instant litigation. To date, the children remain in Mrs. Smith's home--originally the result of a temporary restraining order, later the product of a voluntary stipulation among the parties.

Plaintiffs Mr. and Mrs. Lhotan are similarly authorized foster parents; they, however, are under the supervision of the Nassau County Department of Social Services Children's Bureau. On September 4, 1970, Cheryl and Patricia Wallace were placed in the Lhotan home; two years later they were joined by their younger sisters, Cynthia and Cathleen. By all accounts, most notably that of the children, the reunion was a happy one for all concerned. Indeed, when Mrs. Lhotan was told on June 26, 1974 that the children were to be removed from her home ten days hence, the only reason given was that the four girls were growing too attached to their foster family. Mrs. Lhotan was informed that Cheryl and Patricia were to be returned to their biological mother while Cynthia and Cathleen were to be transferred to another foster home.

However, on July 8, 1974, in response to a request by the Lhotans, Judge Carter issued a temporary restraining order barring the removal of the children which had been scheduled for the next day. That order remained in effect

until March 3, 1975, when it was dissolved by this court. Meanwhile, Mrs. Wallace, the biological mother, had begun habeas corpus proceedings in the state court to secure the return of her children. On February 23, 1976, the Appellate Division for the Second Department upheld a lower court ruling mandating immediate implementation of the plan devised by the Nassau County Department of Social Services Children's Bureau. The time for appeal of that decision has not yet passed.

Mr. and Mrs. Ralph Goldberg, the final set of plaintiff foster parents, face a less imminent threat. They have, since July 1969, taken care of Rafael Serrano, then six years old. Prior to his placement in the Goldberg home, Rafael had lived with a succession of foster families after having been abused by his natural parents during the time that he remained with them. Although the Goldbergs have been repeatedly told that they have done an excellent job in providing a healthy environment in which Rafael might grow and develop, they now fear, on the basis of various unofficial statements, that the Bureau of Child Welfare intends to remove Rafael and place him with his aunt. While the Goldbergs have yet to be officially notified of any such plan, they join in this action to insure that they will be entitled to a pre-removal hearing if and when such a decision is made.

Neither defendants nor intervenors dispute the strength of the emotional ties binding plaintiffs and their foster children nor the loss that will be felt if those ties are severed. Both defendants and intervenors insist, however, that the question now before us is and must be more narrowly focused. We agree. As a statutorily ordained court we must limit our inquiry to a determination of whether plaintiffs have established a deprivation of life, liberty or property sufficient to invoke the protections of the Due Process Clause.

We find no merit in plaintiffs' argument that the realities of the foster care system, as presently administered in New York State, justify their expectation that their role as foster parents will not be abruptly and summarily terminated. See Board of Regents v. Roth, 408 U.S. 564 (1972). The most obvious and formidable obstacle to plaintiffs' contention is the agreement that each of them signed upon assuming responsibility for their respective foster children. The contract employed by the Catholic Guardian Society, typical of those used throughout the state, reserves to the agency the right to recall the child "upon request, realizing that such request will only be made for good reason." While such a provision is not dispositive, Perry v. Sinderman, 408 U.S. 593 (1972), the discretionary authority which it vests in the agency is on its face incompatible with plaintiffs' claim of legal entitlement. We are unpersuaded by plaintiffs' efforts to equate an open-ended relationship with one of indefinite duration. Nor does evidence showing that the average child placed in foster care remains within the system for approximately 4-1/2 years[7/] support the plaintiffs' position. Cf. Perry v. Sinderman, supra.

We find considerably more difficult plaintiffs' assertion that the foster home is entitled to the same constitutional deference as that long granted to the more traditional biological family[8/]. Plaintiffs base their contention upon several recent studies which conclude that the "family" can best be conceived as a psychological entity uniquely characterized by the emotional interdependence of each of its members. E.g. Goldstein, Freud and Solnit, BEYOND THE BEST INTERESTS OF THE CHILD. Plaintiffs argue that it is this interdependence, born out of daily and

intimate contact, which best explains the family's pre-eminent constitutional position. Plaintiff foster parents further insist that their relationship with their foster children fully satisfies this functional definition, although custody of the child is vested in the authorized agency. Social Services Law § 383 (2). They point to decisions such as Stanley v. Illinois, 405 U.S. 645 (1972), which, they claim, indicate the Supreme Court's willingness to look behind legal formalities when inquiring into the existence of a fruitful family life.[9/]

While the intervenors and defendants rely on precisely the same Supreme Court opinions, they emphasize that the holding of each was limited by its facts to biological families. Intervenors, in particular, strongly protest any implication that the contractual relationship between foster parent and foster child is, or even can be, the equivalent of the relationship between a mother and the child to whom she has given birth.[10/] Invervenors have introduced affidavits from eminent experts in social work and psychology which attack the validity of the concept of the "psychological family."[11/] The intervenors also argue that this court would be ill-advised to create a precedent which might later be applied to other foster families less concerned and well-intentioned than those now before us.

We agree with the parties that this debate as to the definition of the family and the role in society is an interesting and important one. We need not and should not, however, reach out to decide such novel questions when narrower grounds exist to support our decision. See Ashwander v. Tennessee Valley Authority, 297 U.S. 233, 341 (1936) (Brandeis, J., concurring).

We believe that the pre-removal procedures presently employed by the state are constitutionally defective. We hold that before a foster child can be peremptorily transferred from the foster home in which he has been living, be it to another foster home or to the natural parents who initially placed him in foster care, he is entitled to a hearing at which all concerned parties may present any relevant information to the administrative decision-maker charged with determining the future placement of the child.[11a/] While our decision today is perforce limited to the class as defined in Judge Carter's accompanying certification order, namely all children in foster care for one year or longer, we note that similar interests suggest a similar result whenever the child is placed in a foster home for long term care.[12/]

The time has long since passed when children were considered mere chattels of the adults with whom they lived. The foster care system itself, initiated in New York in the latter part of the nineteenth century, represented a large step forward from the prior practice of institutionalizing children with the poor and feeble-minded or boarding them out as apprentices or indentured servants. In any event, it is by now well-settled that children are "persons" within the meaning of the Fourteenth Amendment whose rights are entitled to protection against state abridgement. In re Gault, 387 U.S. 1 (1967); Tinker v. Des Moines School District, 393 U.S. 503 (1969); Goss v. Lopez, 419 U.S. 565 (1975). Foremost among those rights, as the Supreme Court has repeatedly held, is the right to be heard before being "condemned to suffer grievous loss," Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurther, J., concurring).

The basis of this right is easily understood. A hearing dispels the appearance and minimizes the possibility of arbitrary or misinformed action. Goldberg v. Kelly, 397 U.S. 254, 266 (1970). In cases such as these, the harmful

consequences of a precipitous and perhaps improvident decision to remove a child from his foster family are apparent. Plaintiffs' experts assert that continuity of personal relationships is indispensable to a child's well adjusted development. We do not need to accept that extreme position to recognize, on the basis of our common past, that the already difficult passage from infancy to adolescence and adulthood will be further complicated by the trauma of separation from a familiar environment. This is especially true for children such as these who have already undergone the emotionally scarring experience of being removed from the home of their natural parents.

Intervenors dispute the seriousness of these losses, relying principally on a longitudinal study conducted by Professor David Fanshell of the Columbia University School of Social Work in which he concluded that there was no statistically significant correlation between a child's successful development and the number of times that child was moved within the foster care system. We find significant, however, Prof. Fanshell's further testimony that, "as a professional, (I) would be against the capricious movement of children." The requirement of a hearing is designed to insure no more.

Most specifically, a hearing is not, as intervenors apparently fear, intended in any way to impede the right of biological parents to regain custody of their children. The law in New York is clear: in the absence of abandonment, formal surrender for adoption or demonstrated unfitness, the "primacy of parental rights may not be ignored." People ex rel. Kropp v. Shepsky, 305 N.Y. 465, 469 (1953); see also, Spence Chapin Adoption Service v. Polk, supra. We do not, by our holding today, disturb that local judgment.[13/]

Nonetheless, we are unable to agree with intervenors' contention that a hearing is therefore superfluous when a foster child is to be returned to his biological parents. Even under such circumstances, a hearing performs the salutary function of providing the agency with an organized forum in which to gather information concerning, inter alia, the frequency with which the biological parent has been visiting his or her child. If the evidence discloses that, despite the diligent efforts of the agency, the biological parent has failed for more than a year to maintain "substantial and continuous contact" with a child in foster care, permanent neglect proceedings may be instituted and the biological parent's presumptive right to custody may be forfeited. Family Court Act § 611, et seq.; In re P., 337 N.Y.S. 2d 203 (Fam. Ct. N.Y. CO. 1972). A fortiori, when the question is whether a foster child is to be moved from one foster home to another, the state in its parens patriae capacity, will be better able to make an informed decision after a hearing at which all relevant information has been presented. The interest of the state, as parens patriae, is therefore compatible with, rather than antagonistic to, the requirement of a hearing. Goldberg v. Kelly, 397 at 265.

Plainly, the present pre-removal conference is not designed adequately to fulfill this data-gathering function. As outlined earlier, the foster parents are denied any right to present evidence or witnesses, the public official with whom they confer is already acquainted with the agency's version of the background facts, and the foster child whose future is at stake does not participate. Such a scheme fails to satisfy even the most minimal requirements of procedural due process. Escalera v. New York City Housing Authority, 425 F. 2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970). We do not understand the defendants seriously to claim otherwise.

Rather, the state argues that any constitutional defect is remedied by the post-removal "fair hearing" provided under N.Y.C.R.R. § 450.14. We disagree. See Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuantes v. Shevin, 407 U.S. 67 (1972). It is, at the least, paradoxical to suggest that a hearing designed to forestall the hasty and ill-advised separation of a foster child from his foster home can occur after that separation has already taken place. We are unpersuaded by defendants' contention that a decision by the hearing examiner to reverse the agency's action and reunite the family effectively restores the status quo. Such a reunion may ameliorate but it cannot eradicate the injury caused by uprooting the child. Indeed, to the degree that implementation of the hearing examiner's decision requires the disruption of arrangements made in the interim, it may further exacerbate the child's sense of loss. It is in the best interests of the child that the risk of such dislocations be avoided or minimized.[13a/]

We find equally without merit intervenors' assertion that § 392 of the Social Services Law adequately protects the due process interests of the foster child. Enacted in 1971, § 392 provides for periodic review of the status of each foster child. One and a half years after being placed in foster care, and every two years thereafter, the Family Court is required to conduct a hearing upon notice to the biological parents, foster parents in whose home the child has lived for at least eighteen months, the child care agency to which the child has been surrendered, and "such other persons as the court may, in its discretion, direct." Following the hearing, an order must be entered incorporating one of four stated dispositional alternatives: that the child be continued in foster care, that he be returned to his natural parents, that proceedings be instituted legally

to free him for adoption or, if legally free already, that he be placed for adoption with specified individuals.

Intervenors' contend that the above procedure, when coupled with the continued jurisdiction of the Family Court, Social Services Law § 392(10), fully satisfies constitutional requirements. We do not agree. Cf. Boone v. Wyman, 295 F.Supp. 1143 (S.D.N.Y. 1969), aff'd. 412 F. 2d 857 (2d Cir. 1969), cert. denied 396 U.S. 1024 (1970).

First,and most obviously, § 392 offers no comfort whatsoever to the child in foster care for less than eighteen months. Second, intervenors' reasoning appears to rest upon an unjustifiably expansive interpretation of the scope of § 392. In In re W., 35 N.Y.S. 2d 245, 248 (Fam. Ct. N.Y. Co. 1974), the court concluded that the power to direct the child to be continued in foster care did not emcompass the authority to order that the child be maintained in any specific foster home.

Third, and most fundamentally, intervenors assume an identity of interest between foster parent and foster child which we are unwilling to accept as we have already indicated by the appointment of separate counsel at the outset of this litigation. The continuing jurisdiction of the Family Court constitutes a safeguard against arbitrary state action only if the proposed removal of the foster child is brought to the court's attention. Intervenors posit that the foster parents will perform this function. They may well be correct in the majority of cases. But we decline to rest the rights of the foster children upon the shoulders of foster parents who, however well-meaning, have a personal involvement and perhaps a financial interest[14/] which may color their conduct. If a hearing is required, as we hold it is, it is required in all cases and cannot be made to depend upon the initiative of third persons.[15/]

A similar flaw taints the amended regulations promulgated by New York City during the pendency of this action. In most other respects, however, New York City's revised procedures represent a significant improvement over the agency conference and post-removal hearing envisaged by N.Y.C.R.R. § 450.14 and already discussed.

As of July 1, 1974, New York City has provided, at the foster parents' request, as a substitute for or supplement to the agency conference, a pre-removal "independent review" conducted "in accordance with the concepts of due process." Its salient features, as set forth in an internal memorandum of August 5, 1974, are as follows: (1) the review is heard before a supervisory official who has had no previous involvement with the decision to remove the child; (2) both the foster parents and the agency may be represented by counsel and each may present witnesses and evidence; (3) all witnesses must be sworn, unless stipulated otherwise, and all testimony is subject to cross-examination; (4) counsel for the foster parents must be allowed to examine any portion of the agency's files used to support the proposal to remove the child; (5) either a tape recording or stenographic record of the hearing must be kept and made available to the parties at cost; and (6) a written decision, supported by reasons, must be rendered within five days and must include a reminder to the foster parents that they may still request a post-removal hearing under N.Y.C.R.R. § 450.14.

While the amended regulations represent a considerable improvement over previous procedures, we note certain deficiencies still present in New York City's current practices. First, as alluded to above, the "independent review" now afforded by New York City is available only upon

the affirmative request of the foster parents. We reiterate that such a restriction is inconsistent with our holding that it is the child's right to avoid arbitrary dislocations which necessitates a hearing. Whatever hearing is provided should be provided as a matter of course.

Second, New York's amended regulations have no applicability whatsoever when the child is to be returned to his biological parents. We see no basis for this distinction which, we believe, erroneously confuses the standard by which evidence is to be judged and the process by which it is gathered. No matter where he is to be placed, a well informed decision cannot but help to promote the child's "best interests," which all parties seek to advance.

Third, it is unnecessary and likely counterproductive to provide duplicate hearings, one pre-removal and a second after the event. We recognize that New York City was operating within the constraint of a statewise regulation, N.Y.C.R.R. § 450.14, which it had no authority to abrogate. We note, however, that the welfare of the child is best served by a speedy and final decision as to his fate.

Fourth, participation in New York City's "independent review" is limited to the foster parents and the agency representative. In order to insure that all relevant information is presented to the hearing examiner, the child and biological parent should be heard as well. Moreover, it may be advisable, under certain circumstances, for the agency to appoint an adult representative better to articulate the interests of the child. In making this determination, the agency should carefully consider the child's age, sophistication and ability effectively to communicate his own true feelings.

It is not, however, necessary that the chosen representative be an attorney. "The insertion of counsel...

would inevitably give the proceeding a more adversary cast," Wolff v. McDonnell, 418 U.S. 539, 570 (1974), which as Mrs. Buttenwieser points out, might well impede the effort to elicit the sensitive and personal information required. Thus, we do not hold that a trial-type hearing, such as that now provided in New York City, is constitutionally requisite. See Morrisey v. Brewer, 408 U.S. 471 (1972). Indeed, we are reluctant to impose any pre-ordained structure upon the endeavor of trained social workers to evaluate the often ambiguous indices of a child's emotional attachments and psychological development. Rather, we believe the sounder course is to allow the various defendants--state and local officials--the first opportunity to formulate procedures suitable to their own professional needs and compatible with the principles set forth in this opinion.

In summary, therefore, we condlude that New York Social Service Law §§ 383(2) and 400, and N.Y.C.R.R. § 450.14, as presently operated, unduly infringe the constitutional rights of foster children. Defendants are enjoined from removing any foster children in the certified class from the foster homes in which they have been placed unless and until they grant a pre-removal hearing in accord with the principles set forth above. Of course, our decision today does not in any way limit the authority of the State to act summarily in emergency situations. Family Court Act § 1021.

The court thanks Mrs. Helen L. Buttenwieser for her valuable assistance as assigned counsel.

Order to be taken on submission.

Dated: March 29, 1976.

J. EDWARD LUMBARD
United States Circuit Judge

ROBERT L. CARTER
United States District Judge

FOOTNOTES

1/ Pursuant to the provisions of 28 U.S.C. §2281, this three judge court was convened to consider plaintiffs' non-frivolous constitutional claims.

2/ In recognition of the independent position advanced by Mrs. Buttenwieser, the term "plaintiff" will be used throughout this opinion to refer only to OFFER and the foster parents although the foster children were also named in the complaint.

2a/ In a separate order, filed concurrently with this opinion, Judge Carter has granted this motion of both plaintiffs and intervenors for class certification. The following parties are thus represented in the instant litigation: All foster parents who have had a foster child live with them continuously for over one year; all foster children who have lived continuously with their foster parents for over one year; and all natural parents who have voluntarily placed children in foster care.

3/ As will be discussed more fully below, New York City has revised its procedures during the course of this litigation.

4/ Authorized agency is defined in New York Social Services Law § 371 (10). It includes any local public welfare children's bureau, such as the defendants New York City Bureau of Child Welfare and Nassau County Children's Bureau, and any voluntary child-care agency under the supervision of th New York State Board of Social Welfare, such as the defendant Catholic Guardian Society of New York.

5/ In October 1974, the New York State Department of Social Services prepared Program Analysis Report No. 56, entitled "Time Spent in Care by Children Served in the New York

State Foster Care Program 1973." The report calculated that "(t)he median length of stay for dependent and neglected children in foster care at the end of 1973 was 4.38 years," at p. 13. This raw statistic was placed in context by Prof. David Fanshell of the Columbia University School of Social Work who testified on the basis of his own longitudinal study that the probability of a foster child being returned to his biological parents declined markedly after the first year in foster care. Professor Fanshell's study, conducted over a five year period, revealed a decline in discharge rate, as follows:

First year -------	24%
Second year ------	13%
Third year -------	8%
Fourth year ------	9%
Fifth year -------	7%

6/ Foster parents boarding children in their home must be licensed annually by an authorized agency pursuant to a legislative scheme set out in New York Social Services Law § 375, et seq.

7/ See note 5, supra.

8/ "The Court has frequently emphasized the importance of the family. The right to conceive and to raise one's children have been deemed 'essential,' Meyer v. Nebraska , 262 U.S. 390, 399 (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and '(r)ights far more precious . . . than property rights.' May v. Anderson, 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The integrity of the family unit has

found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, at 399, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring)." Stanley v. Illinois, 405 U.S. 645, 651 (1972).

9/ In Stanley, the Supreme Court invalidated a provision of Illinois Law which made the children of unwed fathers wards of the State upon the death of the mother. The Court held that absent a hearing, the state was prohibited from presuming that the father would be an unfit parent merely because he had never married.

10/ The defendant Catholic Guardian Society currently pays foster parents $155 per month for each foster child boarded in their home, in addition to an allowance for clothing, medical and dental expenses. This amount is typical of that paid throughout the state.

11/ Plaintiffs have introduced affidavits from similarly eminent experts equally fervent in their support of the concept of the "psychological family."

11a/ Judge Pollack concludes his dissenting opinion with the observation that Social Services Law § 383(3) already "embodie(s) through the right of intervention" the requirement that a pre-removal hearing be provided if the foster child has lived with his foster parents for more than two years. This statement is incorrect. An examination of § 383(3) plainly reveals that while it grants to foster parents the right to intervene in any "proceeding" concerning the custody of foster children who have resided with them for twenty-four months or longer, it does not purport to create any substantive entitlement to a "hearing" or "proceeding" not elsewhere provided. Judge Pollack's contrary interpretation of the statutory language is moreover belied by the current practices of the defendants. Furthermore, the right to intervention granted by § 383(3) extends to the foster parents only and not to the children themselves.

We therefore emphasize once again that, with the exception of the recently amended regulations in effect in New York City, it is presently the law throughout New York State that a pre-removal hearing is unavailable regardless of the duration of the foster relationship being terminated.

12/ Our disposition of this case makes it unnecessary to decide the claim of the foster parents that the challenged statutes and regulations deprive them of the equal protection of the laws.

13/ Accordingly, we see no basis for intervenors' doomsday projection that biological parents who might otherwise entrust their children to the foster care system will be discouraged from doing so, to the detriment of the child, by the decision in this case.

13a/ Nor do we find anything to the contrary in the Supreme Court's recent holding that an evidentiary hearing is not required prior to the termination of disability benefits. Mathews v. Eldridge, 44 U.S.L.W. 4224 (February 24, 1976). Writing for the majority, Justice Powell emphasized the limited and financial nature of the deprivation there suffered by the plaintiff and the necessarily heavy reliance by the agency on medical documentation in reaching its decision. In contrast, the emotional trauma felt by a young child moved from a familiar home is pervasive and potentially devastating. Moreover, in determining whether the best interests of the child would better be served by his removal to another foster family, the social worker must weigh and evaluate a "wide variety of information," much of it subjective and some of it biased. 44 U.S.L.W. at 4232. A hearing provides the procedure for gathering and evaluating such data, thereby minimizing the risk of error.

14/ See note 10, supra.

15/ It is for this reason that we are unable to agree with intervenors' assertion that a constitutionally adequate recourse is provided the foster parents through a petition for habeas corpus or a petition for custody under Family Court Act § 651, even assuming, arguendo, that the above remedies would be available to a foster parent prior to the removal of the foster child.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO; and GEORGE and DOROTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTERAGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Intervenor-Defendants

NOTICE OF APPEAL

74 Civ.2010

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Naomi Rodriguez, Mary Robins, Dorothy Nelson Shabazz, and Lillian Collazo, Intervenor-Defendants above named, on behalf of themselves and all others similarly situated, appeal to the Supreme Court of the United States from the judgment and order of the three-judge district Court (Pollack, D.J., dissenting) entered in this class action on April 14, 1976, wherein the district Court declared

unconstitutional and enjoined the enforcement of New York Social Services Law Sections 383(2) and 400 and New York Codes Rules and Regulations (N.Y.C.R.R.) 450.14, to the extent said statutes and regulation were applied by Defendants to move children from foster homes in which they had been placed for "a year or more," without affording to the children,in every case, notice and a prior hearing with respect to the propriety of the proposed move.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

Dated: New York, New York
June 10, 1976

MARTIE L. THOMPSON
Attorney for Intervenor-
Defendants
Community Action for Legal
Services, Inc.
335 Broadway
New York, New York 10013
(212) 966-6600

Louise Gruner Gans
of Counsel

TO:

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James Gallagher
Office of the County Attorney
of Nassau County
Nassau County Executive Building
West Street
Mineola, New York 11501

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JERRY M. SAUNDERS, being duly sworn, deposes and says: deponent is not a party to the action is over 18 years of age and resides at 15 Fort Washington Avenue, New York, New York.

That on the 10th day of June , 1976 I served the within Notice of Appeal upon:

Marcia Robinson Lowry, Esq.
Attorney for Plaintiffs
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011.

Helen Buttenwieser, Esq.
Attorney for Children
575 Madison Avenue
New York, New York 10022

Maria Marcus, Esq.
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Elliot Hoffman, Esq.
Assistant Corporation Counsel
Municipal Building
New York, New York 10007

James Gallagher
Office of the County Attorney
of Nassau County
Nassau County Executive Building
West Street
Mineola, New York 11501

Said service was made by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this
10th day of June, 1976

JERRY M. SAUNDERS

RICHARD A. DECONNOR
Notary Public, State of New York
No. 31-4510750
Qualified in New York County
Commission Expires March 30, 19[illegible]

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

BEST COPY AVAILABLE

To

Index No. Civ. 2010 Year 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; et al.
Plaintiffs,

-against-

JAMES DUMPSON, individually and as Administrator of the New York City Human Resources Administration, et al.
Defendants

Naomi Rodriguez, et al.
Intervenor Defendants

NOTICE OF APPEAL

MARTTIE L. THOMPSON
Louise Gruner Gans
Attorney for Intervenor Defendants

Office and Post Office Address, Telephone
Community Action for Legal Svcs.
335 Broadway
New York, New York 10013
(212) Tel. 966-6600

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

THE CITY OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES
BUREAU OF CHILD WELFARE

BRONX OFFICE
192 EAST 151ST STREET
BRONX, N.Y. 10451

AUTHORIZATION FOR PLACEMENT OF CHILD(REN) IN FOSTER CARE

Case No. 3109L78

This is to certify that I, Edwin & Naomi Rodriguez

residing at 1030 Nelson Ave. Bronx

am the parents of
relationship

Name	Age
Edwin Rodriguez	b. 2/6/73

and that I authorize the Commissioner of Social Services of The City of New York or his duly authorized representatives to place the said child or children in any duly authorized agency as defined in the Social Services Law of the State of New York.

I specifically agree and consent that if the child or children hereinbefore named or any of them, while receiving care in any authorized agency or society for prevention of cruelty to children, is found to be in need of surgical or medical treatment, that such surgical and medical treatment may be administered under the direction of the authorities of the said authorized agency or society for the prevention of cruelty to children without further action on my part, and that such tests or examination as they deem necessary may be given to the said child or children for the purpose of determining the need of the said child or children for medical or surgical care. I Further authorize the authorities of any authorized agency or society for the prevention of cruelty to children to give such child or children any treatment, inoculation or vaccination for immuniation against contagious diseases as in their judgment may be necessary for the protection of such child's or children's health.

If I do not visit the child or children hereinbefore named while in an uathorized agency, as defined in the Social Services Law of the State of New York, for a period of twelve successive months or more and do not furnish a reason satisfactory to the Commissioner of Social Services of The City of New York or his duly authorized representatives for my failure to do so, the Commissioner of Social Services of The City of New York, in accordance with the authority vested in him by the Social Services Law of the State of New York, the Administrative Code of The City

of New York, and the Domestic Relations Law of the State of New York, has the right to and may, if in his judgment it shall be for the best interest of the child or children hereinbefore named so to do, place out through a duly authorized agency the child or children named above in a free family home, with a view to subsequent adoption.

In witness whereof, I hereunto set my hand this 29 day of March 19 73.

Signed in the presence of

Edwin Rodriguez
Signature of Parent or Guardian

X
(Naomi Rodriguez signs with an "X".)

Department of Social Services Representative

INTERVENORS' APPENDIX "5"

THE CITY OF NEW YORK
HUMAN RESOURCES ADMINISTRATION
SPECIAL SERVICES FOR CHILDREN

AUTHORIZATION TO PLACE CHILD IN FOSTER CARE
(Prepare in Quadruplicate)

Case No. (Illegible)

I (We) Lillian Collazo, residing at

(Illegible) (Illegible) Brooklyn N.Y. (Illegible)
House No. and Street Apt. No. or C/O Borough or P.O. Zip

am (are) the (mother) (father) (legal guardian) of the child James Morales born on 12/12/73 and I (we) authorize the Commissioner of Social Services of the City of New York to place the child in a duly authorized agency as defined in the Social Services Law of the State of New York. I (We) understand that the Commissioner will inform me (us)of the agency with which the child is placed. I (We) also understand it is my (our) responsibility to keep that agency informed of my (our) whereabouts and my (our) plans to resume caring for the child and of any delays which make continuation of placement necessary.

Placement is required because I (we) am (are) unable to make adequate provision for the support, maintenance and supervision of the child in his (her) own home or with relatives or friends.

I (We) anticipate placement will be required for no longer than .1.month... week(s) month(s). I (We) understand that when the reason for placement no longer exists, I (we) should ask for the child's return and that the Commissioner will return the child, provided that the Commissioner is satisfied that I (we) am (are) able to care for the child. In placing the child under the Commissioner's care, I (we) consent to the administration of such immunization, tests and treatments, including dental and surgical treatment, as are considered necessary for the well-being of the child. I (We) understand that I (we) will be consulted, if possible, whenever surgery is necessary. However, in the event that the child requires emergency surgery or treatment, I (we) authorize the Commissioner to consent to such emergency surgery or treatment if, for any reason, I (we) cannot be consulted. I (We) have been further informed and understand that:

1. I (We) and the agency with which the child is placed are expected to work cooperatively in planning for the child and that the agency will offer me (us) whatever help is available to enable me (us) to decide what is best for the child. While the child is in placement, it is my (our) right and responsibility to visit the child regularly and to actively participate in planning until the child can have the benefit of a permanent home, either with me (us) or in an alternative setting.

2. Under the laws of the State of New York if, for a period of six successive months, I (we) do not keep in contact with the child, my (our) failure to do so may be considered abandonment. In addition, if, for a period of one year, I (we) have not made efforts to plan for the child, my (our) failure to do so may be considered permanent neglect under the law. If either of the foregoing should occur, Court action may be taken to terminate my (our) parental rights.

3. Pursuant to the provisions of Section 358a of the Social Services Law, a proceeding may be initiated in the Family Court to obtain Court approval of this instrument and the transfer of the care and custody of the child to the Commissioner of Social Services of the City of New York. In connection with such proceedings, I (we) do hereby consent to the jurisdiction of the Family Court over such proceedings.

4. I (We) waive notice of any such proceeding and service of the petition on me (us) as well as a hearing thereon. I (We) consent that the Family Court Judge's determination be made based solely upon the petition and other papers, if any, that are submitted to the Court, and to the entry of an order approving this instrument and the transfer of care and custody of the child to the Commissioner of Social Services of the City of New York, based upon said determination.

Dated this (Illeg.) day of January, 19 74 .

Signed in the presence of

Lillian Collazo
Signature of Parent or Guardian

(Illegible)
Department of Social Services
Representative

Signature of Parent or Guardian

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-5193

NAOMI RODRIGUEZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Appellants

-against-

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, RALPH and CHRISTIANE GOLDBERG; GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

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of Counsel

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Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

ARGUMENT

Appellees in their Motion to Affirm have not addressed any of the arguments made in Appellants' Jurisdictional Statement. Indeed the question of the rights of parents of voluntarily placed children to have their children returned to them with agency consent is not discussed at all. Appellees' presentation is based entirely on the case of Mrs. Smith, which did not involve the possible return of children home to their parents. An impression is sought to be created by Appellees that very few children are returned to their parents after one year, that most

of the children are neglected and abandoned (p. 11) and that the rights of the children's parents can be ignored. From those assertions, which are clearly not supported by the record, Appellees urge that conceptions of foster care as a temporary measure should be abandoned and instead foster care be treated as a permanent arrangement, without, however, any obligation on the part of the foster parent to make a permanent personal and financial commitment to a child through adoption.* Appellees also mislead when they assert that the procedure provided by 18 N.Y.C.R.R. 450.10 was the only one available to Mrs. Smith and other foster parents for prior review of the proposed move of a foster child.

1. A substantial number of voluntarily placed children return home after one year in foster care. Most of these children were not placed because of abandonment or neglect, and the clear intent of the New York Legislature is for foster care to be a transitional measure, --an intent thwarted by the Judgment below.

The five year study of children in foster care conducted from 1966 to 1971 by Professor David Fanshel and noted by the district Court** showed that 37% of the children, out of the 624 children studied, were discharged to their parents after the first year of placement; 24% had been discharged during the first year.

A subsequent report published by Professor Fanshel for Child Welfare Information Services, Inc., *** shows that in

* Neither Appellees Goldberg or Lhotan sought to adopt (T 135; State ex rel Wallace v. Lhotan, 51 A.D. 2d 252 (2d Dept. 1976). Appellee Smith could have initiated steps for permission to adopt the Gandy children in the SSL §392 proceeding to which she was a party in April 1974. See page 5 , infra.

** Joint Appendix p. 18a, fn. 5

*** Child Welfare Information Services, Inc. is the computerized information system for foster care in New York City established by the City and the voluntary child care agencies.

New York City alone 49.2% (1,343) of all children discharged from foster care after a stay of more than a year during the period June 1974 - May 1975, were returning to their parents. The Tables are annexed hereto as Exhibit A. Similarly, for the period January 1975 to December 1975, again in New York City alone, 48%(1,586) of children were discharged home from foster care after a stay of more than a year. These Tables are annexed as Exhibit B. Accordingly, the hearing requirement imposed by the district Court will in fact obstruct the return of a large number of children from foster care to their parents. Further, Appellants have never been able to follow Appellees' reasoning that because a few children go home after one year, the return of even those few should be impeded.

Appellees similarly misinterpreted the record when they assert that most children are placed in foster care because of neglect and abandonment. This assertion is false. According to the testimony of Robert Catalano,* who compiled Report #56 for the State Department of Social Services, the Report lumped its statistics for children who have been adjudged neglected or abandoned together with those for voluntarily placed children who are "dependent." Social Services Law §371.7 defines dependent child as "one in the custody of or wholly or partly maintained by an authorized agency or an institution, society or organization or charitable eleemosynary, correctional or reformatory character." The reasons why "dependent" children are admitted to foster care cannot be determined from Report #56. In fact, most children in voluntary foster care placement are there because ofphysical and mental illness, marital breakup, out of wedlock births, need for special education or treatment for the child, financial difficulties and "all kinds of problems of survival of generally poor and minority people."**

* Catalano 4/14/75 pp. 13-18.

** Fanshel 4/8/75 p. 14

The argument, in Appellees' Motion to Affirm, that foster care lasting longer than one year should be treated as the permanent arrangement as against the childrens parents,simply because children in New York experience prolonged stays in foster care, in effect seeks to institutionalize the worst feature of the New York foster care system as it has existed. This is clearly contrary to the intent of the New York Legislature, which has sought, since approximately 1970, to reform the New York foster care system by facilitating either the return of children home to their parents or adoption.* To achieve these goals, every session of the Legislature since 1970 has produced major changes in the laws governing foster care; enactment of Social Services Law §§392, 384-a, 358-a, Family Court Act §262 and amendment of Social Services Law §§383, 384 and Family Court Act §611, et seq. Social Services Law §§384-a and 392 in particular are intended to avoid the prolonged retention of children in foster care. New rights for foster parents were also recognized, Social Services Law §392, 383, Family Court Act §262. However, the legislature has not placed a limit on the length of time a child may remain in foster care and return home with the agencies' consent. On the contrary, the agencies must now obtain a Court order if they refuse a parent's request to have the child returned, Social Services Law §384-a.** Appellees have not presented any serious reasons why New York's attempts to reform its foster care system and to facilitate the return of children to their parents should now be thwarted. At the same time Social Services Law §392 Proceedings as well as custody proceedings are available

* Only if more children are discharged from foster care can the old statistics for length of time in foster care change.

** Except where a parent asks for the child prior to the time agreed upon with the agency.

to foster parents for prior review of a decision to move a foster child.

2. Existing procedures available to foster parents provide prior judicial review of the proposed move of a foster child, in which the child may be separately represented.

Appellees are simply incorrect when they say that the 18 N.Y.C.R.R. 450.10 conference was the only prior review of the agency's decision to move the children available to Mrs. Smith and the other foster parents, (p. 6) and that Social Services Law §392 review, in particular, could not provide such relief. (p.16-17) All named foster parents in this action were parties to Social Services Law §392 proceedings concerning the foster children in their care, at the time this action was commenced.

With respect to the Gandy children, the agency postponed their removal from the foster home of Mrs. Smith because a Social Services Law §392 review hearing concerning these children had already been scheduled in the New York Family Court for April 24, 1976, with Mrs. Smith as a party.* On that date Mrs. Smith appeared and secured an adjournment from the Court so that she could retain counsel.** Mrs. Smith then secured the services of Ms. Lowry, who, however, instead of returning to Family Court, instituted this action and obtained a temporary restraining order against the removal of the Gandy children on the basis of an affidavit which did not reveal that a 392 proceeding was pending in Family Court. ***

In the case of Appellees Goldberg, Mrs. Goldberg testified that the only time the removal of Rafael Serrano from that foster

* Affidavit of Barbara Graber 5/28/74, submitted 1/10/75.

** Plaintiffs' Reply Memorandum, November, 1974, p. 26

*** Affidavit Marcia Robinson Lowry 5/9/74.

home was concretely discussed was by the Family Court Judge at a 392 review hearing; a 392 hearing in that case was in progress when she joined this action.* A 392 review had been held for the Wallace children in 1972, with the Lhotans as parties, and the Family Court had continuing jurisdiction pursuant to Social Services Law §392 (10).**

Either in the 392 proceeding or by initiating an independent custody proceeding, pursuant to Family Court Act §651,Mrs. Smith as well as the other individual Appellees could by Order to Show Cause and Stay have secured a review of the proposed move of the foster children in their care, *** Matter of Dionisio R., 81 Misc. 2d 436, 366 N.Y.S. 2d 280 (Family Court New York County 1975); In re Custody of Mack, 81 Misc. 2d 802, 367 N.Y.S. 2d 644 (Family Court, Queens Co. 1975); Matter of Reed v. Daniels, 45 A.D. 2d 980 (App. Div. 4th Dept. 1974); Matter of Kurtis v. Ballou, 33 A.D. 2d 1034 (App. Div. 2nd Dept. 1970). In the Social Services Law §392 proceeding an indigent foster parent is even provided with assigned counsel, Family Court Act §262. Foster parents' right to resort to these remedies was not barred by the fact that children were in their physical custody, Hicks v. Bridges, 2 A.D. 335, 155 N.Y.S. 2d 746 (App. Div. 1st Dept., 1956); Application of Chin, 41 Misc. 2d 641, 246 N.Y.S. 2d 306, 41 Misc. 2d 650, 246 N.Y.S. 2d 316 (1963). In any custody proceeding the Trial Court has power to issue stays. Such a stay was issued even in In re W., 77 Misc. 2d 374, 355 N.Y.S. 2d 245 (Family Court, New York County, 1974) the only case relied on by the district Court in its discussion of Social Services Law §392 and custody proceedings.*

Further,in the 392 review the Family Court may assign a law guardian--independent counsel-for the child pursuant to Family Court Act §249,and in fact the Family Court usually does so in any contested 392 proceeding. See, for example, In re Spencer, 74 Misc. 2d 557, 346 N.Y.S. 2d 645 (Family Court, New York County 1973); Matter of Carla L., 45 A.D. 2d 375, 357 N.Y.S. 2d 987 (App. Div. 1st Dept. 1974); Matter of Dionisio R., supra; In re Zweibel, 79 Misc. 2d 366, 358 N.Y.S. 2d 795 (Family Court, Nassau County 1974); In the Matter of Mark H, 80 Misc. 2d 593, 363 N.Y.S. 2d 73 (Family Court, St. Lawrence Co., 1974); In re Janice K., 82 Misc. 2d 983, 372 N.Y.S. 2d 381 (Family Court, New York County, 1975). The provision for independent representation of children made by the district Court is in fact less than what is already provided under existing procedures.

In light of the availability of those judicial procedures, the creation of another parallel administrative procedure by the district Court was unnecessary. The procedure mandated by the district Court, in conflict with the provisions of Social Services Law §392, 384-a 383(1) and 383(3) will only create havoc in the operation of the New York foster care system.

CONCLUSION

FOR THE FOREGOING REASONS IN ADDITION TO THOSE CONTAINED IN APPELLANTS' JURISDICTIONAL STATEMENT, IT IS RESPECTFULLY REQUESTED THAT APPELLEES' MOTION TO AFFIRM BE DENIED AND THAT THIS COURT NOTE PROBABLE JURISDICTION AND GRANT PLENARY CONSIDERATION TO THE INSTANT APPEAL.

---

* T 134-135, 139-141, Affidavit of Louise Gruner Gans, 10/25/74.

** T 161-162

***With respect to the younger Wallace girls, the Lhotans may have been limited to the 392 review, since those two girls had been in that foster home for under 2 years. (SSL §383(3)).

*Joint Appendix p. 14a; fn 15 p. 20a.

Dated: New York, New York
September 17, 1976

Respectfully submitted

MARTTIE L. THOMPSON, ESQ.
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CHILD WELFARE INFORMATION SERVICES, INC.
200 MADISON AVENUE, NEW YORK, N.Y. 10016

CWIS

COMPUTERIZED DATA FOR CHILDREN IN FOSTER CARE:

First Analyses from a Management Information Service in New York City

o

DAVID FANSHEL and JOHN GRUNDY

COLUMBIA UNIVERSITY SCHOOL OF SOCIAL WORK

EXHIBIT "A"

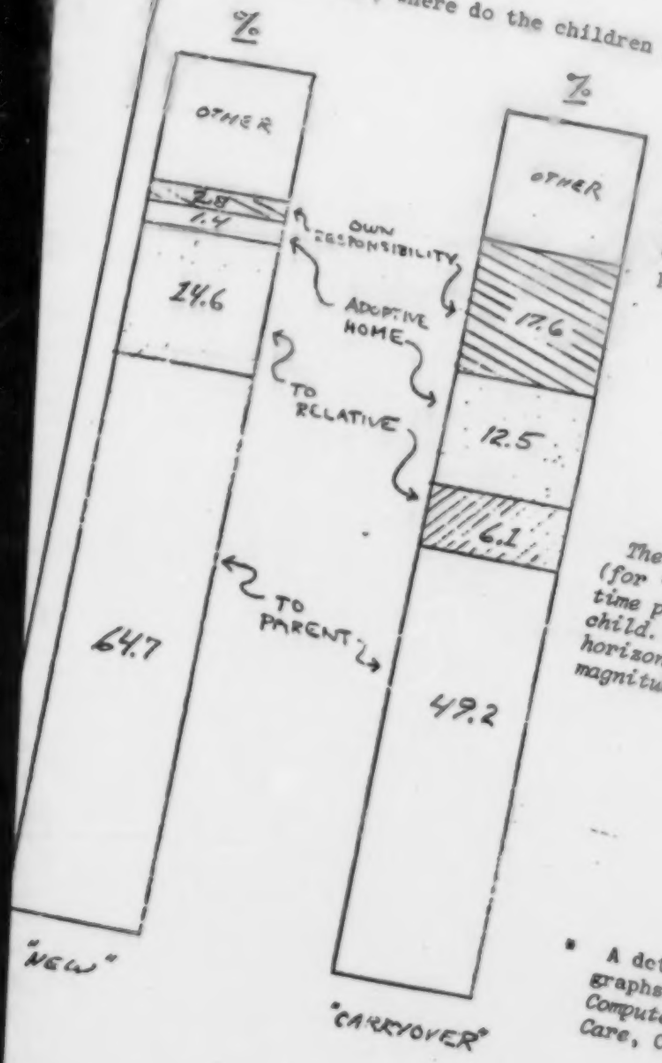
BEST COPY AVAILABLE

CWIS REPRODUCIBLE

There is much interest in the child care community as to how children leave care -- where do they go, and is that destination consonant with the plan for the child?

CWIS data analyzed by David Fanshel and John Grundy sheds some light on these questions.

First of all, where do the children go?



The graphs* to the left indicate the discharge destinations of children discharged between June 1, 1974 and May 31, 1975.

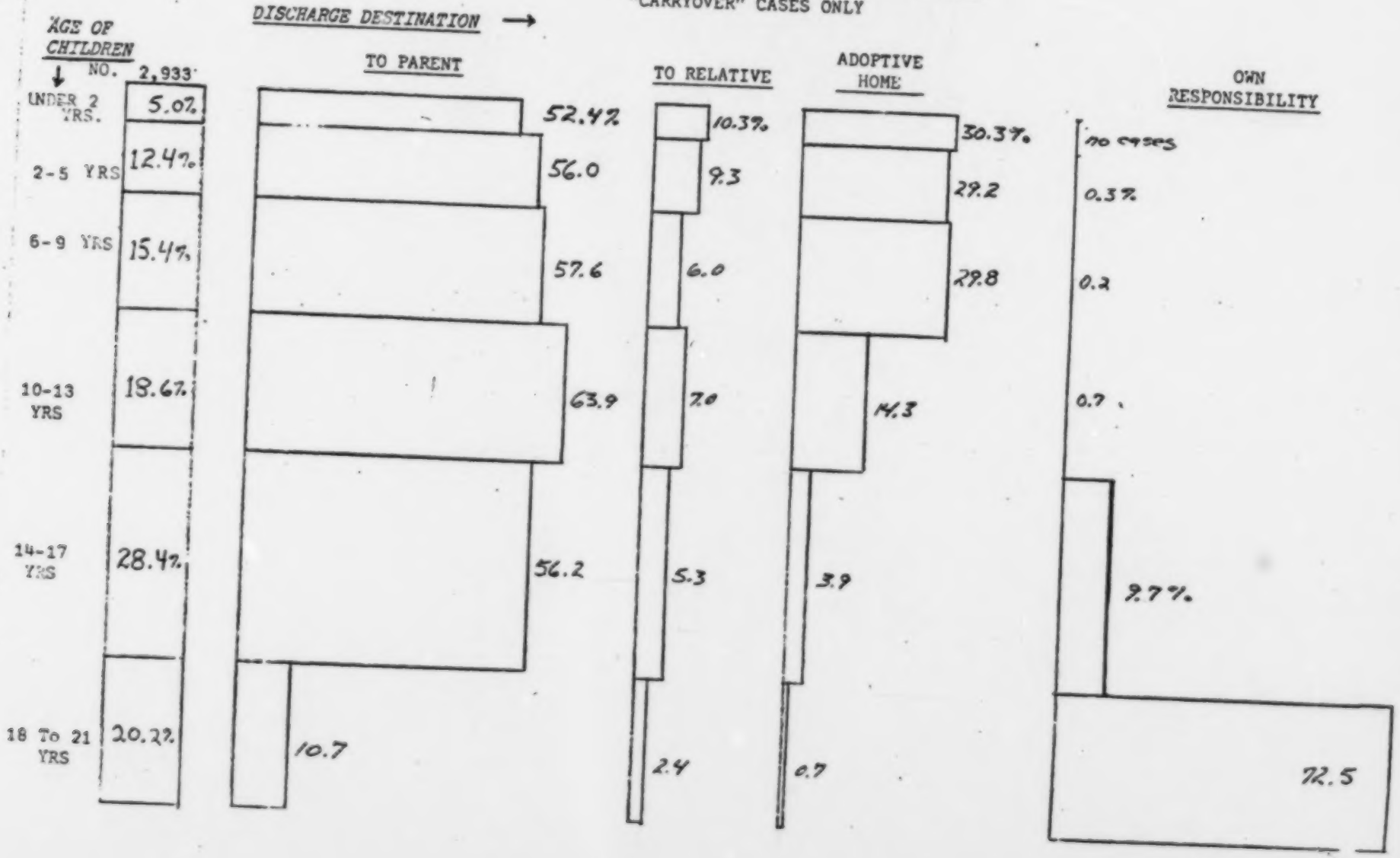
"New" arrivals are children who entered care during the period referenced above. "Carry-over" cases are those who were already in care prior to June 1, 1974.

The display on the following page indicates (for "carry-over" cases only, during the same time period) where children went by age of child. (The chart is proportionately spaced horizontally and vertically, to indicate magnitude).

* A detailed table supporting these graphs can be found in: Fanshel & Grunay, *Computerized Data for Children in Foster Care*, CWIS, New York, 1975, p.43.

BEST COPY AVAILABLE

DESTINATION OF CHILDREN DISCHARGED - BY AGE
"CARRYOVER" CASES ONLY



CWIS inc

CHILD WELFARE INFORMATION SERVICES, INC.

SYSTEM LEVEL REPORTS

DECEMBER 31, 1975

EXHIBIT "B"

PREPARED BY:
DAVID FANSHEL AND JOHN F. GRUNDY
RESEARCH AND DEMONSTRATION CENTER
COLUMBIA UNIVERSITY SCHOOL OF SOCIAL WORK
622 WEST 113TH STREET
NEW YORK, NEW YORK 10025

TO THOSE RECEIVING THE CWIS SYSTEM LEVEL REPORTS
FOR THE PERIOD ENDING DECEMBER 31, 1975

THE ATTACHED REPORT IS BASED ON DATA FROM 104 AGENCIES OR MAJOR AGENCY DIVISIONS CURRENTLY ON THE CWIS SYSTEM. CWIS NOW MAINTAINS RECORDS FOR 37457 CHILDREN. OF THESE 543 ARE CHILDREN WHO ARE NOT NEW YORK CITY CHARGES AND ARE EXCLUDED FROM SYSTEM LEVEL REPORTS. OF THE REMAINING 36914 CHILDREN 8833 HAVE BEEN DISCHARGED. DISCHARGED CHILDREN ARE INCLUDED IN THIS REPORT ONLY IN THE SECTION CONCERNING DISCHARGES AND ADMISSIONS. THE OTHER SECTIONS OF THIS REPORT INCLUDE 28081 CHILDREN CURRENTLY IN CARE OR ON SUSPENDED PAYMENT.

APPENDIX B1

Destination of Children Discharged During Period June 1, 1974 - May 31, 1975 For New Arrivals and Carry-Over Cases*

(Percentages)

Destination	New Arrivals	Carry-Over Cases
Parent	64.7	49.2
Relative	14.6	6.1
Free Adoptive Home: Foster Home	0.6	1.6
Free Adoptive Home: Other	0.7	2.5
Subsidized Adoptive Home: Foster Home	0.1	7.7
Subsidized Adoptive Home: Other	0.0	0.7
Self (Own responsibility)	2.8	17.6
Adult Mental Institution	0.0	0.1
Child Mental Institution	0.1	0.5
Penal Institution	0.4	0.5
Job Training	0.0	0.3
Military	0.0	1.1
Other	14.1	9.1
Don't Know	1.8	1.4
No Response	0.0	1.5
TOTAL	100.0	100.0
No. of Cases	679	2,742

*New arrivals are cases of children who entered care during the period June 1, 1974 to May 31, 1975. Carry-over cases represent children who were already in care prior to June 1, 1974.

TABLE 53
DISCHARGE DESTINATION BY ADMISSION DATE OF CHILDREN
DISCHARGED BETWEEN 1- 1-75 AND 12-31-75
(N= 4292)

DATE OF ADMISSION:	ADMITTED AFTER 12-31-74	ADMITTED BEFORE 1- 1-75
DISCHARGE DESTINATION:	%	%
RETURN TO NATURAL PARENT	70.1	48.1
RELEASED TO RELATIVE	13.9	6.1
FREE ADOPT-FOSTER FAMILY	-0.0	2.5
FREE ADOPTION-OTHER	0.4	2.6
SUBS.ADOPT-FOSTER FAMILY	-0.0	11.3
SUBSIDIZED ADOPT-OTHER	-0.0	0.8
REL. TO OWN RESPSIBILITY	2.8	18.1
ADULT MENTAL INSTITUTION	0.1	0.2
CHILD MENTAL INSTITUTION	0.5	0.2
PENAL/CORRECTIVE INST.	0.2	0.4
ENTER ADULT JOB TRAINING	-0.0	0.2
TO ENTER MILITARY	-0.0	1.0
OTHER	9.8	7.1
UNKNOWN	1.4	1.1
NOT REPORTED	0.7	0.5
TOTAL:		
PERCENT	100.0	100.0
NUMBER OF CASES	988	3304

A "-).0" PERCENT INDICATES THERE ARE NO CASES IN THAT SUB-CATEC
ROWS AND COLUMNS WITH NO CASES ARE OMITTED FROM THE TABLE.
BOOLD I, IT EOF
REPLY Y